Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

WALTER ROSALES; MARIE TOGGERY;
KAREN TOGGERY,

Petitioners,

v.

KEAN ARGOVITZ RESORTS, INC., a limited liability company; LAKES GAMING, INC., a publicly traded company; KEAN-ARGOVITZ RESORT-JAMUL, LLC, a Nevada limited liability company; LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, a Delaware limited liability company,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a private conspiracy by non-Indian gaming corporations is actionable under 42 U.S.C. 1985(3), where it deprives the Petitioners of the right to vote because Petitioners are Indians and members of a tribal political faction?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 1
REASONS FOR GRANTING THE WRIT 9
CONCLUSION 22
APPENDIX
CIRCUIT COURT DECISION (5/21/02) 1a
DISTRICT COURT DECISION (4/18/01) 14a
STATUTES 16a
SECOND AMENDED COMPLAINT 21a

TABLE OF AUTHORITIES

CASES

BRAY V. ALEXANDRIA WOMEN'S HEALTH CLINIC, 506 U.S. 263 (1993) ..... *passim*

BURNS-TOOLE V. BYRNE, 11 F.3RD 1270(5TH CIR.1994), CERT. DENIED, 512 U.S. 1207 (1994) 10

BUSH V. GORE, 531 U.S. 98 (2000) 13

CAMERON V. BROCK, 473 F.2D 608 (6TH CIR. 1973) 9, 14, 16

CANLIS V. SAN JOAQUIN SHERIFF'S POSSE COMITATUS, 641 F.2D 711 (9TH CIR. 1981) 10

EDWARDS V. OCCIDENTAL CHEM. CORP., 892 F.2D 1442 (9TH CIR. 1990) 21

FOMAN V. DAVIS, 371 U.S. 178 (1962) 21

GLASSON V. CITY OF LOUISVILLE, 518 F.2D 899 (6TH CIR. 1975) 9, 16

GRIFFIN V. BRECKENRIDGE 403 U.S. 88 (1971) 9, 10, 13

HAMPTON V. HANRAHAN, 600 F.2D 600 (7TH CIR. 1979), MOD. ON OTHER GROUNDS, 446 U.S. 754 (1980) 9, 11

HARRISON V. KVAT FOOD MGMT., INC., 766 F.2D 155 (4TH CIR. 1985) 10

HINSHON V. KING & SPALDING, 467 U.S. 69 (1984) 12, 21

JENKINS V. MCKEITHEN, 395 U.S. 411 (1969) 21

KEATING V. CAREY, 706 F.2D 377 (2ND CIR. 1983) 9, 10, 16

LIFE INS. CO. V. REICHARDT, 591 F.2D 499 (9TH CIR. 1979) 16, 18

MEANS V. WILSON, 522 F.2D 833 (8TH CIR. 1975) CERT. DENIED, 424 U.S. 958 (1976) 9, 14

MOORE V. OGILVIE, 394 U.S. 814 (1969) 14

REYNOLDS V. SIMS, 377 U.S. 533 (1964) 13

STEVENS V. RIFKIN, 608 F. SUPP. 710 (N.D. CAL. 1984) 9, 17, 18, 19

THOMPSON V. NEW YORK, 487 F. SUPP. 212 (N.D.N.Y. 1979) 9, 16

UNITED BHD. OF CARPENTERS & JOINERS, LOCAL 610 V. SCOTT , 463 U.S. 825 (1983) 10, 11, 17, 20

STATUTES

18 U.S.C. 597 ..... 1, 2, 12, 13

25 U.S.C. 461 6

25 U.S.C. 1302(8) 12

25 U.S.C. 2703(6) 5

25 U.S.C. 2703(7)(A) 5

25 U.S.C. 2703(8) 5

25 U.S.C. 2710(d)(1) 1

25 U.S.C. 2711(e)(2) 1, 7, 12, 13

28 U.S.C. § 1254 1

42 U.S.C. 1985 16

42 U.S.C. 1985(3) ..... *passim*

OTHER AUTHORITIES

65 F.R. 31189 ..... 7, 13

F.R.C.P. Rule 12(b)(6) 6, 12

PRIVATE CONSPIRACIES TO VIOLATE CIVIL RIGHTS, 90 HARV. L. REV. 1573 (1977) 11

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, dated May 21, 2002, is set forth in the Appendix ("App.") p. 1a. The opinion of the United States District Court for the Southern District of California, dated April 18, 2001, is set forth in the Appendix at 3a – 15a.

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Ninth Circuit issued its Decision in this case on May 21, 2002. This Petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves 42 U.S.C. 1985(3), 18 U.S.C. 597, and 25 U.S.C. 2710(d)(1) and (2)(A) and (B), and 25 U.S.C. 2711(e)(2), the relevant portions of which are set forth verbatim in the Appendix at pp. 16a – 20a.

STATEMENT OF THE CASE

Introduction

Petitioners allege that the non-Indian Respondent corporations have conspired to unlawfully pay a reported $100,000 a month to deprive the Petitioners of their right to an undiluted vote in federal tribal elections at the Jamul Indian Village. Petitioners further allege that the Respondents' conspired to interfere with their right to vote, because Petitioners are Indians, and members of the tribal political faction that supports Petitioner ROSALES' election as Chairman of the Village, and opposes building a casino on land where the Petitioners' homes now stand and their ancestors are buried.

Respondents' "invidiously discriminatory animus" has already unlawfully and unduly influenced sufficient Village

votes to raze the Petitioners' homes and displace their families. The non-Indian Respondents' unlawful contributions evidence both a "racial and otherwise class-based invidiously discriminatory animus," because the Petitioners are Indians, and members of the political faction within the Village that supports ROSALES' election and is opposed to constructing a Class III gaming casino on the site of their homes.

Contrary to Indian gaming's public relations campaign, not all Native Americans believe that Indian gaming is the new white buffalo, in the stampede to build a casino money machine on every Native American doorstep. Many, like the Petitioners here, believe that Indian gaming trades one form of federal economic assistance for another. They further believe that the recipients of the ill gotten gains of gaming remain chained to a greed driven, predatory vice, scientifically designed to squeeze the last available dollar from every player, which merely re-distributes income from those ill-prepared to resist the temptations of un-earned gaming windfalls, so that the Respondents may profit from what is skimmed from those who can least afford to gamble with their livelihood.[1]

Non-Indian Respondents have no right to dilute the Petitioners' vote in federal tribal elections at the Village, or otherwise violate federal election laws, by making, or soliciting, an expenditure in consideration of a vote, or the withholding of a vote, in any federal tribal election. 18 U.S.C. 597. None of the Respondents have any right to make contributions of money, property, and other consideration in an attempt to "unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity." 25 U.S.C. 2710(d)(2)(B)(ii) and 2711(e)(2). Nor do Respondents have any right to discriminate against Petitioners by depriving Petitioners of the right to an undiluted vote, lawful use of their homes, and

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[1] So concludes the National Gambling Impact Study Commission, in its 1999 report to the President and Congress, which also finds there are more than 15 million problem gamblers, 13% of the total; half the profits are raked in from the top 5% of heavy players, who are disproportionately those who can least afford the habit, and are the least educated about their problem.

the benefit of their contracts, in the headlong rush to build a Class III gaming casino.

This case presents a unique opportunity, in the limited context of Indian political factions, for the Court to further define the type of "racial or otherwise class-based invidiously discriminatory animus" that may be remedied by a cause of action for damages under 42 U.S.C. 1985(3). It also provides the Court with the opportunity to answer the long-standing question as to the scope of the protection afforded by 42 U.S.C. 1985(3), and to resolve the conflicts among the circuit courts of appeals, concerning these important questions of federal law.

Background

On April 22, 1998, Chief Judge of the Interior Board of Indian Appeals (IBIA), Kathryn Lynn, found in favor of Petitioners' claim that there had not been a lawful election at the Village since 1992.

> The Board concludes that, in the absence of proof that only tribal members voted and/or were elected to office in any of the three elections at issue in this appeal, Departmental recognition of the results of any of the elections would violate the Village's constitution. It therefore ... reverses that part of the [Regional director's] decision which recognized the results of the 1995 tribal election... The Board is aware that this decision will continue the Village's leadership controversy. In effect, the decision reinstates the officers elected in the 1992 tribal election, which is the last election that is not before the Board in this appeal. 32 IBIA 167.

Judge Lynn further remanded, and later consolidated in Case No. 00-28-A, the appeals of the Bureau of Indian Affairs ("BIA")' failure to recognize the lawful results of the 1995, 1997, 1999, and 2001 elections, in which Petitioner ROSALES was elected Chairperson of the Jamul Indian Village. On remand, the administrative record demonstrates

that the Regional Director violated Judge Lynn's remand order, by failing to "assist the Village's actual members in addressing their membership and leadership problems in light of this decision," 32 IBIA 168, refusing to meet with the Petitioners, and failing to consider the "proof that only tribal members voted and/or were elected to office" in the 1995, 1997, 1999 and 2001 elections. These violations of Judge Lynn's remand order by the Regional Director remain on administrative appeal in IBIA No. 00-28-A.

In addition, Chief Judge Lynn also found that subsequent decisions by the BIA Regional Director to ignore Petitioner ROSALES' election, and recognize the results of elections in which non-members voted, have no force or effect, once an appeal is filed with the IBIA. The IBIA has repeatedly held that "once an appeal is filed with the [IBIA], the BIA loses jurisdiction over the matter except to participate in the appeal as a party. See *Hammerberg v. Acting Portland Area Director* 24 IBIA 78 (1993)," "because the identity of those individuals who should be recognized as the governing body for the Village is the central question in this appeal." October 26, 1996, Order in Case No. 97-7-A.

Since the remand of what the IBIA describes as "the membership and leadership"dispute has not yet reached a final decision, the only government of the Jamul Indian Village that has been lawfully recognized, by the ranking member of the U.S. government and the Department of Interior, is that elected by the Jamul Indian Village General Council in 1992. The results of all subsequent "elections" held by any faction at the Village remain on appeal with the IBIA in Case No. 00-28-A.

During the pendency of these appeals, the four Respondent corporations, as alter egos of each other, entered into a Memorandum of Agreement Regarding Gaming Development and Management Agreements on February 15, 2000, for the purpose of building a casino, with the faction of the Village, that opposes the election of Petitioner ROSALES, and the faction whose elections have already been found by the IBIA to have violated the Jamul Indian Village constitution.

In addition, the Federal Register provides judicial notice that a Class III gaming ordinance has not been adopted, as required by 25 U.S.C. 2710(d)(1)(A)(i), nor has any proposed Class III gaming ordinance been approved by the Chairman of the National Indian Gaming Commission ("NIGC"). 25 U.S.C. 2710(d)(1)(A)(iii) and 2710(d)(2)(A) and (B).[2]

Nor could a Class III gaming ordinance have lawfully been approved during the negotiations with the Respondent corporations, since the IBIA has already determined that the BIA/NIGC can take no further action with regard to the Village while the IBIA appeals remain pending, and since the IBIA has also determined that there have not been any lawful elections at the Village since 1992.

Procedural History

Petitioners' Complaint was filed on September 22, 2000. An Answer was filed on behalf of two individual defendants, Kevin Kean, and Jerry Argovitz, who, due to amendment, are no longer parties in this case. Petitioners filed a First Amended Complaint against the four corporate Defendants remaining in this case, KEAN ARGOVITZ RESORTS, INC., LAKES GAMING, INC., KEAN-ARGOVITZ RESORTS-JAMUL, LLC, LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, on November 16, 2000.

The four corporate Defendants moved to dismiss the First Amended Complaint on December 19, 2000. The trial court rendered an order granting the motion to dismiss with leave to amend the Petitioners' civil rights claims on February 2, 2001.

The Petitioners filed a Second Amended Complaint against the four corporate Defendants on February 28, 2001. App. at pp. 21a – 48a. The four corporate Defendants filed a motion to dismiss the Second Amended Complaint pursuant

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[2] Class III gaming is defined as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. 2703(8). Generally, Class I gaming is typically identified as social games solely for prizes of minimal value. See 25 U.S.C. 2703(6). Class II gaming is usually associated with games of chance such as bingo. See 25 U.S.C. 2703(7)(A).

to F.R.C.P. Rule 12(b)(6) on March 12, 2001. The Petitioners filed an opposition to the Defendants' motion to dismiss on March 26, 2001.

The trial court granted the Defendants' motion to dismiss pursuant to F.R.C.P. Rule 12(b)(6), and denied Petitioners leave to further amend their Second Amended Complaint, on April 18, 2001. App. pp. 3a – 15a. Petitioners timely filed a notice of appeal of that order to the United States Court of Appeals for the Ninth Circuit, on May 1, 2001. The United States Court of Appeal for the Ninth Circuit affirmed the District Court's decision in an unpublished memorandum decision, on May 21, 2002. App. pp. 1a – 2a.

Statement of Facts

Petitioners, WALTER ROSALES, MARIE TOGGERY, KAREN TOGGERY, are Indian residents of San Diego County, and are enrolled members and residents of the Jamul Indian Village, a tribal governmental entity of Kumeyaay Indians, recognized by Congress, governed by a Constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq., and located in Jamul, California.[3]

Respondents, KEAN ARGOVITZ RESORTS, INC., LAKES GAMING, INC., KEAN-ARGOVITZ RESORTS-JAMUL, LLC, LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, are alleged to be the agents and the alter-egos of each other, and operated by non-Indians.

The following is a summary of the facts alleged in Petitioners' Second Amended Complaint, concerning their claims for relief under 42 U.S.C. 1985(3). App. pp. 21a – 48a.

Respondents are alleged to have unlawfully conspired to unduly influence the tribal electorate, with payments reported to be $100,000 a month, to attend the Village meetings, to vote to bulldoze the Petitioners homes in order to build a casino, and otherwise interfere with the Petitioners' contracts and federal benefits. App. pp. 26a – 28a.

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[3] MARIE TOGGERY died during the pendency of the appeal to the United States Court of Appeals for the Ninth Circuit. Her surviving claims are now being prosecuted by the representative of her estate, Karen Toggery.

Petitioners allege that these illegal contributions by the Respondents, were made to discriminate against the Petitioners, because of their race and their membership in the political faction of the tribe, which opposes building a casino where their homes now stand, and which elected Petitioner ROSALES Chairman of the Village. App. pp. 26a – 28a, and 44a. The purposeful effect of these illegal contributions has been to dilute the legitimate members' vote, and deny the Petitioners' political faction a majority, in all subsequent tribal elections. App. pp. 28a and 44a.

In addition to paying the electorate to wrongfully eject the Petitioners from their homes, and to otherwise interfere with the Petitioners' contracts and federal benefits, the Respondents have also been making these payments, in an attempt to unduly influence those voting to adopt a Class III gaming ordinance, at some unspecified time in the future. App. pp. 27a – 28a, 44a – 45a.

The Respondents' contributions violate the Indian Gaming Regulatory Act and the Tribal-State Compact offered by California Governor Gray Davis to Jamul. IGRA specifically prohibits a prospective management contractor from unduly interfering and influencing, or attempting to unduly interfere or influence, for its gain or advantage, any decision or process of tribal government, relating to Class III gaming activities. 25 U.S.C. 2711(e)(2) and 2710(d)(2)(B)(ii).

The Tribal-State Compact offered by California Governor Gray Davis to Jamul specifically prohibits the contribution of more than $25,000 in any given year, prior to the licensing of any "Gaming Resource Supplier," or "Financing Source." Compact, Sec. 6.4.5 and 6.4.6; excerpted at App. pp. 19a and 20a. See also, 65 F.R. 31189. Section 6.1 of the Tribal-State Compact provides that none of the Respondent corporations can be so licensed, in the absence of a lawfully adopted Class III gaming ordinance approved by the Chairman of the NIGC. App. pp. 19a. The Federal register confirms that no Class III gaming ordinance has been approved by the NIGC.

The Respondents have also been making these illegal payments to the faction of the Village opposed to the

Petitioners holding office, contingent upon that faction depriving the Petitioners' of their homes and depriving the Petitioners of their federal benefits as Native Americans. App. pp. 27a, par. 19.

Since on or about September 30, 1999, the Respondents have been paying the Petitioners' political opponents, while they have verbally threatened the Petitioners and their children with physical harm on more than one occasion, used racially derogatory and ancestral slurs against the Petitioners to harass and intimidate them, thrown rocks at the windows of Petitioners' houses and vehicles, and are believed to have burned down one of the Petitioners' trailers and set a truck on fire adjacent to another Petitioner's house. App. pp. 27a, par. 20, and 44a, par. 77.

The non-Indian Respondents thereby have invidiously discriminated against the Indian Petitioners, due to their race, and due to their membership in the tribal political faction, which opposes building a casino on the site of their homes, and which elected Petitioner ROSALES Chairman of the Village. App. pp. 44a – 45a.

The non-Indian Respondents thereby have invidiously discriminated against the Indian Petitioners by unduly interfering with their quiet enjoyment of their homes and contracts rights, and by unduly interfering with the Petitioners' right to exercise their elective franchise free from dilution and undue influence. App. pp. 44a - 45a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The Ninth Circuit decision in this case is in conflict with the decisions of other courts of appeals and district courts, which hold that a cause of action is stated under 42 U.S.C. 1985(3), based upon a conspiracy to deprive the Petitioners of the right to vote, because of their race and membership in a recognized political faction. See for e.g., *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975) *cert. denied*, 424 U.S. 958 (1976); *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *mod. on other grounds*, 446 U.S. 754 (1980); *Thompson v. New York*, 487 F. Supp. 212 (N.D.N.Y. 1979); *see also*, *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975); *Keating v. Carey*, 706 F.2d 377 (2nd Cir. 1983); and *Stevens v. Rifkin*, 608 F. Supp. 710 (N.D. Cal. 1984).

In *Griffin v. Breckenridge* 403 U.S. 88 (1971) ("*Griffin*"), this Court determined that a complaint based on 42 U.S.C. 1985(3), against a private conspiracy, i.e. a conspiracy not involving state action, states a cause of action, if the complaint alleges:

> that the defendants did (1) 'conspire or go in disguise on the highway or on the premises of another' (2) 'for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.' It must then assert that one or more of the conspirators (3) did, or caused to be done, 'any act in furtherance of the object of (the) conspiracy,' whereby another was (4a) 'injured in his person or property' or (4b) 'deprived of having and exercising any right or privilege of a citizen of the United States.' 403 U.S. 88, 102-103.

Griffin also holds that a deprivation of equal protection may be redressed under Section 1985(3), where there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action." *Id.*, at 102. The Ninth Circuit's comment that: "No post-*Griffin* court has found that Sec. 1985(3) is limited exclusively to racial situations," is still true today. *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 719 (9th Cir. 1981).

As Justice Scalia noted in *Bray v. Alexandria Women's Health Clinic ("Bray")*, 506 U.S. 263, 268 (1993), this Court has "not yet had occasion to resolve the 'perhaps'." Following *Bray*, the full range of "otherwise class-based, invidiously discriminatory animus" that is actionable under 42 U.S.C. 1985(3), still remains to be defined by this Court.[4]

On more than one occasion, this Court has refused to reject, and has refused to retreat from, its original holding in *Griffin*, that Section 1985(3) protects against other than purely racial class-based conspiracies. *Bray*, 506 U.S. at 268; and *United Bhd. of Carpenters & Joiners, Local 610 v. Scott ("Scott")*, 463 U.S. 825, 836 (1983). Rather, this Court merely held that the alleged classes in *Bray* and *Scott* were not protected classes under Section 1985(3). Similarly, this Court has never rejected the views of Justices O'Connor, Stevens, and Blackmun that Section 1985(3) is not limited to purely race-based conspiracies, particularly in light of the legislative history that Justice White acknowledged, "has been marshaled in support of the position that Congress meant to forbid wholly non-racial, but politically motivated conspiracies." *Scott*, 463 U.S. at 836.

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[4] See, for e.g., *Burns-Toole v. Byrne*, 11 F.3rd 1270, 1275-76, n. 25 (5th Cir.1994), *cert. denied*, 512 U.S. 1207 (1994), "Subsequent decisions [*Scott* and *Bray*] have refused to delineate [1985(3)'s] outside boundaries;" and *Harrison v. KVAT Food Mgmt., Inc.*, 766 F.2d 155, 157-59 (4th Cir. 1985), acknowledging "considerable controversy" over the scope of 1985(3); see also, Justice Meskill's concurring and dissenting opinion in *Keating v. Carey*, 706 F.2d 377, 393 (2nd Cir. 1983), in which "the reported decisions demonstrat[ing] the range of views held by the federal courts over the scope of this section," are referred to as a "sea of confusion."

However, the "difficult question" that Justice White described at one end of the potential range of actionable animus, as to "whether section 1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group by use of otherwise unlawful means," 463 U.S. at 836, does not require answer in this case, because the invidiously discriminatory conspiracy in this case, is not the "wholly non-racial, but politically motivated conspiracy,"described in *Scott*, 463 U.S. at 836. Therefore, the "constitutional shoals that would lie in the path of interpreting section 1985(3) as a general federal tort law," are avoided in this case in the same manner as they were in *Griffin*, at 102, by the fact that it is the combination of "some racial" and political animus that caused the invidious discrimination that compels remedy under 1985(3).

This case provides the Court with the opportunity to decide, along with the majority of circuit courts of appeals and district courts cited above that have considered the question, that a private conspiracy to invidiously discriminate against a recognized political faction, caused by a combination of racial and political motives, is actionable under 42 U.S.C. 1985(3). As the Seventh Circuit held in *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979), *mod. on other grounds*, 446 U.S. 754 (1980): "The statute was intended, perhaps more than anything else, to provide redress for victims of conspiracies impelled by a commingling of racial and political motives.[fn. omitted] And this is precisely the sort of conspiracy alleged by plaintiffs in this case."[5] Just as this Court refused to ignore the combination of racial and political animus in *Hampton*, against members of the Black Panther Party because they were black; this Court cannot ignore the combination of racial and political animus by the non-Indian Respondents against the Petitioners' tribal faction because they are Indian.

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[5] See, Comment, Private Conspiracies to Violate Civil Rights, *90 Harv. L. Rev.* 1573, 1728 (1977), cited in *Hampton*, "the legislative history behind section 1985(3) points unmistakably to the conclusion that discrimination on (the basis of political beliefs or affiliations) was intended to be actionable."

Here, the Petitioners have properly plead that a private conspiracy of non-Indian gaming corporations has deprived them of the right to vote in federal tribal elections, because they are Indians, and because they are members of a political faction, which is opposed to building a casino on the site of their homes, and which supports Petitioner ROSALES' election as Chairman of the Village. App. pp. 26a – 28a, and 44a.[6]

Petitioners further allege that Respondents' overt acts violating 25 U.S.C. 1302(8) and 42 U.S.C. 1985(3), were coupled with disparaging racial remarks concerning the Petitioners' respective degrees of Indian blood, including, but not limited to, referring to them as 'half blood Indians' and 'a half blood community.' App. pp. 27a, and 44a.

Petitioners allege that the Respondents' paid a reported $100,000 per month to the Petitioners' political opponents contingent upon voting to raze the Petitioners' homes and denying them the equal benefits of their contracts and usufructuary property rights in the Village assets. App. pp. 26a – 27a, and 44a. These payments to the Petitioners' political opponents are also alleged to have diluted the Petitioners' vote, and thereby denied them a majority in all tribal elections. App. pp. 27a – 28a, and 44a.

These payments are alleged to be in violation of 18 U.S.C. 597, and 25 U.S.C. 2711(e)(2) and 2710(d)(2)(B)(ii), in an attempt to unduly influence those voting in federal tribal elections to adopt a Class III gaming ordinance, at some undetermined time in the future. App. pp. 28a and 44a – 45a.

The Respondents were also alleged to have made these unlawful payments to members of the political faction opposing Petitioners' election, who had verbally threatened the Petitioners and their children with physical harm, used racially derogatory and ancestral slurs against the Petitioners to harass and intimidate them, thrown rocks at the windows of the Petitioners' homes and vehicles, burned one of the

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[6] Since the District Court dismissed the Petitioners' action pursuant to F.R.C.P. Rule 12(b)(6), the Court must accept Petitioners' allegations as true. *Hinshon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Petitioners' trailers, and set a truck on fire adjacent to another Petitioner's house. App. pp. 27a and 44a-45a.

This Court identified in *Griffin* that the "rights of national citizenship which Congress has the power to protect by appropriate legislation," "included interference with voting rights in National elections." 403 U.S. at 106. Congress has specifically prohibited the Respondents' paying for votes, and thereby diluting the Petitioners vote in federal elections at the Village, by prohibiting the making, or soliciting, an expenditure in consideration of a vote, or the withholding of a vote, in any federal election. 18 U.S.C. 597.

Congress has also prohibited a prospective management contractor from unduly interfering and influencing, or attempting to unduly interfere or influence, for its gain or advantage, any decision or process of tribal government, relating to Class III gaming activities, in the Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. 2711(e)(2) and 2710(d)(2)(B)(ii).

Pursuant to Congress' adoption of IGRA, the Tribal-State Compact offered by California Governor Gray Davis to Jamul also prohibits the contribution of more than $25,000 in any given year, prior to the licensing of any "Gaming Resource Supplier," or "Financing Source." Compact, Sec. 6.4.5 and 6.4.6; excerpted at App. pp. 19a – 20a. See also, 65 F.R. 31189. Section 6.1 of the Tribal-State Compact provides that none of the Respondent corporations can be so licensed, in the absence of a lawfully adopted Class III gaming ordinance approved by the Chairman of the NIGC. App. p. 19a. The Federal Register further confirms that there has been no Class III gaming ordinance approved by the NIGC.

This Court holds that: "the right to vote is protected in more than the initial allocation of the franchise...'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush v. Gore*, 531 U.S. 98, 104-105 (2000), citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

For example, in *Moore v. Ogilvie*, 394 U.S. 814 (1969), this Court invalidated a county based procedure that diluted the influence of citizens in larger counties in the nominating process; "the idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Id.*, at 819.

Following this reasoning, the Eighth Circuit held in *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976), that the 1985(3) protection of the right to undiluted federal elections extends to those held at Indian Villages: "It is thus apparent that the right to vote in federal elections is a right of national citizenship protected from conspiratorial interference by 42 U.S.C. 1985(3)." *Id.*, at 838.

Here, the Ninth Circuit Court of Appeals and the District Court for the So. Dist. of Cal. chose to ignore the reasoning of the Eighth Circuit in *Means*, and the Sixth Circuit in *Cameron v. Brock*, 473 F.2d 608, 610 (6th Cir. 1973), which was relied upon in *Means*. Here, the District Court dismissed the Petitioner's entire cause of action under 42 U.S.C. 1985(3), with no more than a footnote, "The Court is not bound or persuaded by *Means* and declines to follow its reasoning here," App. pp. 8a, 14a, fn3; which dismissal the Court of Appeals affirmed, "for the reasons stated by the district court." App. p. 2a.

In *Means*, the Eighth Circuit held that the right to vote is fundamental to representative government. As a right of national citizenship, it is a source of constitutional power, and Congress has used its power to guarantee that right by statute. *Id.*, at 838, citing *Griffin*, at 106. Where Indian tribes have adopted Anglo-Saxon democratic processes for selection of tribal representatives, equal protection concepts applicable to the tribes require adherence to the one person one vote principle as a necessary concomitant of the election process. Therefore, the Eighth Circuit concluded in *Means*: "42 U.S.C. 1985(3) protects the right to vote in tribal elections against interference from private conspiracies as well."

> Since the right to vote in a system of representative government is one of the essential trappings of citizenship protected by

> the Constitution, we hold that Congress has necessarily granted it to the plaintiffs, and in a proper case, interference with the right to vote in a tribal election may be vindicated under 42 U.S.C. 1985(3), as a deprivation of equal protection of the laws or equal privileges and immunities under the law. *Id.*, at 839.

In *Means* the Eighth Circuit further found that allegations "that Respondents conspired and did overt acts in furtherance of a conspiracy to deprive the plaintiffs of their right to vote because they were supporters of plaintiff Means and members of the American Indian Movement," were sufficient to state a cause of action under Section 1985(3).

In determining that the plaintiffs were members of a sufficiently recognized "class" to be protected from class-based invidious discrimination, the *Means* court held:

> There need not necessarily be an organizational structure of adherents, but there must exist an identifiable body with which the particular plaintiff associated himself by some affirmative act. It need not be an oath of fealty; it need not be an initiation rite; but at least it must have an intellectual nexus which has somehow been communicated to, among and by the members of the group." *Id.*, at 839-40.
>
> The group of plaintiffs in this case, by their affirmative acts of supporting plaintiff Means and the American Indian Movement and attempting to oust Wilson as their Council President, were a class against whom, according to the allegations of their complaint, the Respondents discriminated because of their class membership. This brings their complaint within the ambit of 42 U.S.C. 1985(3)." *Id.*, at 839.

Despite the Ninth Circuit's refusal to follow the reasoning in *Means* in this case, the Ninth Circuit relied upon

Means and *Cameron v. Brock* (6th Cir. 1973) 473 F.2d 608, in *Life Ins. Co. v. Reichardt* (9th Cir. 1979) 591 F.2d 499, 505. In *Cameron*, the Sixth Circuit found that 42 U.S.C. 1985 protected "clearly defined classes, such as supporters of a political candidate," without "transform[ing] the statute into the "general federal tort law" feared by the *Griffin* court, and [gave] full effect to the Congressional purpose in enacting the statute." *Id.*, at 610.

Despite having acknowledged that "many federal courts have unhesitatingly expanded the protections of sec. 1985(3) well beyond the racial context," *Canlis*, at 719, fn. 15, the Ninth Circuit's memorandum opinion in this case also conflicts with the Second Circuit's finding in *Keating v. Carey*, 706 F.2d 377 (2nd Cir. 1983), that a member of the Republican party was protected under 1985(3) from being fired because he was Republican. "In our view, Congress did not seek to protect only Republicans, but to prohibit political discrimination in general...Congress sought, among other things... to prohibit acts of political recrimination that deprived their victims of equal privileges and immunities or the equal protection of the laws." *Id.*, at 387-88.

The court of appeals decision here also conflicts with another Sixth Circuit decision in *Glasson v. City of Louisville* (6th Cir. 1975) 518 F.2d 899, *cert. den.* 423 U.S. 930 (1975), wherein a demonstrator protesting against President Nixon was found within the political class protected by 42 U.S.C. 1985(3). "A more invidious classification than that between persons who support government officials and their policies and those who are critical of them is difficult to imagine." *Glasson*, 518 F.2d 899, 912.

Thompson v. New York (N.D.N.Y. 1979) 487 F. Supp. 212, also conflicts with the court of appeals decision in this case. There, the alleged conspiracy to deny plaintiffs police and fire protection because they were "Indians, relatives of Indians, and residents of Indian reservations," "sufficiently support[ed] the required animus... because of their race...[to] "have thus stated a claim for relief under Section 1985(3)." *Id.*, at 228.

While not every group of individuals suffering discrimination is a "protected class" under *Griffin*,[7] a very thoughtful opinion in *Stevens v. Rifkin*, 608 F. Supp. 710 (N.D. Cal. 1984), citing *Means*, *Glasson*, and *Keating*, sets forth the compelling reasons why a dissident political group is a "class" protected by Sec. 1985(3). The *Stevens* court was particularly persuaded by the legislative history of 42 U.S.C. 1985(3), in which members of Congress specifically stated their intent that political factions be protected from discrimination under Sec. 1985(3).

> Statements from members of both houses evidence this purpose of the Act to protect lawful political activity from the conspiratorial acts of others. Senator John Sherman stated in support of the legislation: 'Here is a political organization; with political ends, political aims; it shows that the object and intent of that political organization is to prevent large masses of the people of the southern states from enjoying a right which has been guaranteed to them by the Constitution of our country.' Cong. Globe, 42d Cong., 1st Sess. 153 (1871). *Id.*, at 723.

Senator Edmunds is often quoted by the courts of appeals in conflict with the Ninth Circuit here, that if a conspiracy were formed against a man "because he was Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, ...then this section could reach it." Cong. Globe, 42 Cong., 1st Sess. 567 (1871).

Even the Ninth Circuit conceded in *Reichardt*:

> Section 1985's drafters clearly intended to protect groups other than oppressed southern blacks. The Congressional debates evinced

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[7] *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) women seeking abortion insufficient class, *United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825 (1983) non-union members insufficient class.

> concern for all groups subject to the organized lawlessness of the Ku Klux Klan, including all Unionist, Republicans and certain religious groups. Courts construing Sec. 1985(3) have not limited its protection to racial or otherwise suspect classifications. 591 F.2d at 505.

Judge Aguilar concluded in *Stevens*: "This Court must agree with the conclusions of these courts that the Ku Klux Klan Act was motivated in large part as a desire to inhibit one political group from attempting to violate the civil rights of another political group. This is the best interpretation of the Act."*Id.*,608 F.Supp. at 723. As Justice Stevens concluded in the dissent in *Bray*: "The text of the statute provides no basis for excluding from its coverage any cognizable class of persons who are entitled to the equal protection of the laws." 506 U.S. at 319.

Protecting the Petitioners from invidious discrimination because they are Indians and members of the recognized political faction opposed to building a casino on the site of their homes, will also not raise the risk of turning Sec. 1985(3) into a "general federal tort law," because the Petitioners were already members of the political faction that opposes building a casino and supports ROSALES' election, before the Respondents' began their invidious discrimination against the Petitioners. Hence, the Petitioners did not become members of a protected class, merely because the Respondents chose to make them victims of the combination of their racial and political animus. As noted by Judge Aguilar in *Stevens*:

> As plaintiffs' Complaint alleges that plaintiffs are members of a political group, and as plaintiffs allege further that that group is the subject of a class-based invidiously discriminatory animus and a conspiracy to deprive plaintiffs of their civil rights, and as plaintiffs' "class" as alleged exists independently of the Respondents' alleged actions and is not defined simply as the group of victims of the Respondents' actions,

> plaintiffs have stated a claim for relief under Section 1985(3). *Id.*, at 726.

Similarly, here, the Petitioners have alleged that the Respondents conspired to deprive them of the undiluted right to vote in tribal elections, because they are Indians and because they are members of the political faction that is opposed to building a casino and that supports Petitioner ROSALES' election as Chairman of the Village. App. pp. 26a – 28a, and 44a – 45a. Moreover, just as in *Stevens*, the Petitioners' "class" is not defined simply as the group of victims of the Respondents' actions, but as the opposing political faction of the Village, who was elected to the leadership of the Village in 1995, long before the Respondents began their invidious discrimination. App. pp. 26a – 28a and 44a.

The *Stevens* court further concluded that without a civil action under Section 1985(3), political minorities may well be without any protection whatsoever from private conspiracies, contrary to our nation's long history of protecting the political minority's rights:

> It is clear that the purpose behind the Ku Klux Klan Act was to federally protect the rights of persons from deprivation on account of their lawful political beliefs, activities, and associations. ... Permitting minority political groups to exercise their rights has been historically treasured in America, and is often thought of as the device for accomplishing political change. To leave minority, or less popular, political groups without Section 1985(3) protection could render them without protection at all. Otherwise, the majority, and the law enforcement authorities responsible to that majority, can unlawfully infringe upon the rights of the minority simply because they are part of the majority. 608 F.Supp. 710, 725.

Justices Blackmun and O'Connor joined in explaining the compelling need for a federal civil rights remedy for private conspiracies like that of the Respondent gaming

corporations in this case, where the conspiracy wields such power and influence over the local government, that it becomes powerless to protect the Petitioners from invidious discrimination:

> Congress intended to provide a remedy to *any* class of persons, whose beliefs or associations placed them in danger of not receiving equal protection of the laws from local authorities. While certain class traits, such as race, religion, sex, and national origin, *per se* meet this requirement, other traits also may implicate the functional concerns in particular situations. Dissent in *Scott*, 463 U.S. at 853 (emphasis added); see also, O'Connor's dissent in *Bray*, 506 U.S. at 354.

Here, there is no question based upon the face of the Petitioners' Second Amended Complaint, that they have already failed to receive equal protection of the laws from the local authorities at the Jamul Indian Village, due to the overwhelming effect that the invidiously discriminatory payments of $100,000 per month have had on the tiny tribal electorate. The Petitioners and their supporters have been denied a majority in all subsequent tribal elections. Petitioners' vote has been diluted by the undue and corrupting influence such unlawful contributions have produced.

If the Petitioners are not to be protected by Section 1985(3), against the Respondents' racial and political discrimination in this case, non-Indian gaming corporations across the country will be given a wholesale license to invade other racially and politically discreet Indian villages, and spend their billions for whatever invidiously discriminatory actions it takes to remove indigenous Americans from their homes and their land, in the headlong rush to put a casino on every corner in Indian country.[8] Post hoc justifications for

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[8] The May 8, 2002, Hartford Courant reports that Indian gaming generates $13 billion in revenue, with an economic impact of $32 billion, from 340 Indian gaming facilities in 29 states, and that Merrill Lynch forecasts Indian gaming will grow 10% in 2002.

such clearly racially and politically motivated discrimination against those whose usufructuary rights stem directly from their race as Indians, is not what Congress intended, nor what this Court should permit.

No matter how the Respondents seek to torture the Indian Gaming Regulatory Act in an attempt to defend the indefensible racially and politically motivated invidious discrimination, Congress and this Court have never allowed such a conspiracy to dilute a class of Americans' voting rights in violation of Sec. 1985(3), for any reason; let alone for the sake of casino construction in the overwhelming and unbridled expansion of gambling in America.

Just as in *Griffin*, *Means*, *Hampton*, *Cameron*, *Glasson*, *Keating*, *Thompson*, and *Stevens*, in which similar racial and political classes were found to be protected from class-based animus, under 42 U.S.C. 1985(3), the Indian Petitioners, by their affirmative acts of supporting Petitioner ROSALES as Chairperson, and opposing the building of a casino, are a protected class against whom the non-Indian Respondent gaming corporations unlawfully discriminated because of Petitioners' class membership.

Therefore, the Petitioners' Second Amended Complaint properly states a cause of action under 42 U.S.C. 1985(3), and the trial court's dismissal of the Sixth Claim for Relief should be reversed, and at a minimum, the Petitioners should be granted leave to amend their complaint under 42 U.S.C. 1985(3).[9]

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[9]Leave to amend should be freely given, where as here, there has been no showing of prejudice to the Defendants; *Foman v. Davis*, 371 U.S. 178, 182 (1962); leave to amend should be granted with great liberality, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); facts alleged in the complaint must be accepted as true, and viewed in the light most favorable to the plaintiff, *Hinshon v. King & Spalding*, 467 U.S. 69, 73 (1984); and leave to amend need only have been requested in the opposition papers, as here. *Edwards v. Occidental Chem. Corp.*, 892 F.2d 1442, 1445-46, fn.2 (9th Cir. 1990).

CONCLUSION

The decision of the Ninth Circuit Court of Appeals conflicts with the majority of other circuit courts of appeals and district courts to have considered the question in this case. In most circuits, a private conspiracy remains actionable under 42 U.S.C. 1985(3), where it deprives the Petitioners of the right to vote in federal tribal elections because of a combination of "racial and otherwise class-based invidiously discriminatory animus."

Similarly here, the private conspiracy by the non-Indian Respondent gaming corporations should be held liable for depriving the Petitioners of the right to vote because the Petitioners are Indians and members of the political faction opposed to building a casino on the site of their homes.

For all of the foregoing reasons, the writ of certiorari to the Ninth Circuit Court of Appeals should be granted.

Respectfully submitted,

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(Any footnotes trail the end of each document.)

No. 01-55745

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER ROSALES; MARIE TOGGERY;
KAREN TOGGERY,
Plaintiffs - Appellants,

v.

KEAN ARGOVITZ RESORTS, INC., a limited liability company; LAKES GAMING, INC., a publicly traded company; KEAN-ARGOVITZ RESORT-JAMUL, LLC, a Nevada limited liability company; LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, a Delaware limited liability company,
Defendants - Appellees.

May 10, 2002 **, Submitted, Pasadena, California

May 21, 2002, Filed

COUNSEL:
For WALTER ROSALES, MARIE TOGGERY, KAREN TOGGERY, Plaintiffs - Appellants: Patrick D. Webb, Esq., WEBB & CAREY, San Diego, CA.

For KEAN ARGOVITZ RESORTS, INC., LAKES GAMING, INC., KEAN-ARGOVITZ RESORT-JAMUL LLC, LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA LLC, Defendants - Appellees: Ernest Slome, Esq., LEWIS, D'AMATO, BRISBOIS & BISGAARD, Jeffrey A. Miller, LEWIS DAMATO BRISBOIS & BISGAARD, San Diego, CA.

For KEAN ARGOVITZ RESORTS, INC., LAKES GAMING, INC., KEAN-ARGOVITZ RESORT-JAMUL LLC, LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA LLC, Defendants -

Appellees: Cynthia F. Gilbertson, MASLON EDELMAN BORMAN & BRAND, David F. Herr, MASLON EDELMAN BORMAN & BRAND, LLP, Minneapolis, MN.

JUDGES:
Before: KLEINFELD and GRABER, Circuit Judges, and BOLTON, *** District Judge.

OPINION:

MEMORANDUM

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

We have carefully reviewed the Second Amended Complaint and the parties' briefs, and for the reasons stated by the district court, we agree that the plaintiffs failed to state a claim upon which relief could be granted. The decision of the district court is AFFIRMED.

Footnotes

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Susan Ritchie Bolton, United States District Judge for the District of Arizona, sitting by designation.

No. 00-CV-1910 W (POR)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WALTER ROSALES; MARIE TOGGERY; KAREN TOGGERY, Plaintiffs - Appellants,

v.

KEAN ARGOVITZ RESORTS, INC., a limited liability company; LAKES GAMING, INC., a publicly traded company; KEAN-ARGOVITZ RESORT-JAMUL, LLC, a Nevada limited liability company; LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, a Delaware limited liability company, Defendants - Appellees.

ORDER DISMISSING PLAINTIFFS' SECOND AMENDED COMPLAINT; DENYING PLAINTIFFS' MOTION FOR LEAVE TO AMEND

Before the Court is Defendants' motion to dismiss Plaintiffs' Second Amended Complaint (hereinafter "SAC") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiffs Walter Rosales, Marie Toggery and Karen Toggery collectively oppose. Plaintiffs also seek leave to file a Third Amended Complaint pursuant to Rule I 5 of the Federal Rules of Civil Procedure. Defendants oppose. All parties are represented by counsel. The Court decides the matter on the papers submitted and without oral argument pursuant to Civil Local Rule 7.1(d.1).

I. BACKGROUND

On October 17, 1988 Congress enacted the Indian Gaming Regulatory Act ("IGRA") which, among other things, allows federally recognized Native American tribes to establish casino gaming to promote tribal economic development and self-sufficiency. See 25 U.S.C. §§ 2701 et seq. IGRA requires all Native American tribes intending to

pursue Class III [fn1] casino gaming to negotiate a Tribal-State compact ("Compact") with the state in which the tribal lands are located. See id. The Secretary of the United States Department of the Interior must also approve the Compact. See id.

The Jamul Indian Village ("Village"), a federally recognized Native American tribe, is seeking to establish Class III casino gaming on Jamul land. On October 8, 1999 the Village executed a Tribal-State compact with the State of California. On May 5, 2000 the Secretary of the Department of the Interior approved the Compact.

In February 2000, before the Compact was signed by the Secretary, the Village executed a management contract with Defendant Lakes Kean-Argovitz Resorts-California, LLC [fn2], to manage Village gaming operations. (See Defs.' Mem. of P. & A. to Dismiss SAC at 2-3.) The National Indian Gaming Commission ("NIGC") is currently reviewing the contract for final approval. (See id. at 3.) Absent such approval, the project cannot go forward. (See id.)

Plaintiffs Walter Rosales, Marie Toggery and Karen Toggery ("Plaintiffs") are Village members and residents. Plaintiffs' First Amended Complaint ("FAC") alleged seven claims for relief based on Defendants' association and contracts with the Village. Specifically, Plaintiffs alleged: (1) interference with contractual and economic advantage; (2) fraud; (3) negligent misrepresentation; (4-6) civil rights violations per 42 USC. 198 1, 1982 and 1985; and (7) seek declaratory relief.

By order dated February 1, 2001 this Court dismissed Plaintiffs' entire FAC. Specifically, the Court held that: (1) IGRA and the Compact did not provide Plaintiffs with a private right of action; (2) IGRA preempted Plaintiffs ' state law claims; (3) the Compact did not require the application of California law to Plaintiffs' claims; and (4) Plaintiffs' civil rights allegations were deficient. Plaintiffs were granted leave to amend their federal claims. However, Plaintiffs' state law

claims for interference with contractual and economic advantage, fraud and negligent misrepresentation were dismissed with prejudice without leave to amend.

On February 28, 2001 Plaintiffs filed a Second Amended Complaint. Once again, Plaintiffs allege: (1) interference with contractual and economic advantage; (2) fraud; (3) negligent misrepresentation; (4-6) civil rights violations per 42 U.S.C. §§1981, 1982 and 1985; and (7) seek declaratory relief. On March 12, 2001 Defendants responded with a motion to dismiss for failure to state a claim.

II. LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the sufficiency of the complaint. See North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 58 1 (9th Cir. 1983). Dismissal of a claim under this Rule is appropriate only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

Under Rule 12(b)(6), a court may dismiss a complaint in three instances. First, dismissal is warranted where the complaint lacks a cognizable legal theory. See Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 53334 (9th Cir. 1984); Neitzke v. Williams, 490 U.S. 3 19, 326-27 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law."). Second, a complaint may be dismissed where it presents a cognizable legal theory yet fails to plead essential facts under that theory. See Robertson, 749 F.2d at 533. Third, dismissal is appropriate where the complaint pleads facts that affirmatively establish that the plaintiff has no legal claim. See, Weisbuch v. County of Los Angeles, 1 19 F.3d 778, 783 n.1 (9th Cir. 1997); American Nurses' Ass'n v. Illinois, 783 F.2d 716, 723 (7th Cir. 1986) (Posner, C.J.) ("A plaintiff who files a long and detailed complaint may plead himself out of court by including factual

allegations which if true show that his legal rights were not invaded.").

In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the court must assume the truth of all factual allegations and must construe them in the light most favorable to the nonmoving party. See North Star, 720 F.2d at 580. However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. See Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981); see also In re Verifone Sec. Litig., 11 F.3d 865, 868 (9th Cir. 1993).

III. DISCUSSION

A. PLAINTIFFS' FEDERAL CIVIL RIGHTS CLAIMS

Plaintiffs allege that Defendants violated their civil rights pursuant to 42 U.S C. §s 198 1, 1982 and 1985(3). Defendants counter that Plaintiffs' allegations fail to state a claim. Specifically, Defendants contend Plaintiffs' claims fail because "Plaintiffs continue to rely on IGRA in order to state their theories" and "Plaintiffs have not met the strict pleading requirements associated with their various Civil Rights claims." (Defs.' Mem. of P. & A. to Dismiss SAC at 7-8.)

The Court agrees.

"[Section] 1981 prohibits racial discrimination in the making and enforcement of private contracts." Patterson v McLean Credit Union 491 U.S. 164, 172 (1989). "In order to withstand a motion to dismiss for failure to state a claim, a 1981 cause of action need only allege 'that plaintiff suffered discrimination ... on the basis of race." Parks School of Business, Inc,.v. Symington, 51 F.3d 1480, 1487 (9th Cir. 1995) (citing Karim-Panahi v. Los Angeles. Police Dep't, 839 F.2d 621, 625 (9th Cir. 1988)); see also Evans v. McKay, 869 F.2d 1341, 1344 (9th Cir. 1989) ("What is required in a section 1981 action...is that the plaintiffs must show intentional discrimination on account of race.").

Section 1982 prohibits the deprivation of property rights based on race. See Jones. v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968). The raced-based deprivation must be intentional. See General Bldg. Contractors .Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 387-90 (1982).

Finally, Section 1985(3) prohibits a conspiracy to interfere with a plaintiff's civil rights. See 42 U.S.C. § 1985(3). "An indispensable element of a claim under 42 U.S.C. § 1985(3) is some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action." Addisu v. Fred Meyer, Inc, 198 F.3d 1130, 1134 (9th Cir. 2000) (citation and internal quotations omitted).

Accordingly, in order to sustain a claim under §§ 1981, 1982 and 1985, Plaintiffs must allege facts demonstrating intentional racial discrimination. Specifically, Plaintiffs must "allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of racially discriminatory intent." Yusuf v. Vassar College, 35 F.3d 709, 713 (2d Cir. 1994) (citations omitted). "A complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)." Id.

In this case, Plaintiffs' SAC does not provide a basis to infer a discriminatory motive for Defendants' purported acts. Plaintiffs' factual allegations in support of their civil rights claims all involve Defendants "providing valuable consideration to a political faction opposed to Plaintiffs ... coupled with disparaging racial remarks concerning the Plaintiffs' respective degrees of Indian blood . . . referring to them as 'half blood Indians' and 'a half blood community." (SAC ¶¶ 60-61, 68--69, 76-77; see Pls.' Opp'n at 7-8, 11.) Construing Plaintiffs' allegations in the light most favorable to them, North Star, 720 F.2d at 580, the above allegations do not support an inference of intentional racial discrimination.

For example, Plaintiffs contend that Defendants illegally contributed money to the Jamul Indian Village electorate, "which the Defendants have used to deprive Plaintiffs' civil rights." (Pls.' Opp'n at 7.) According to Plaintiffs, Defendants contributed money to a political faction opposed to: (1) Plaintiffs holding office; (2) Plaintiffs' prosecution of certain IBIA (Interior Board of Indian Appeals) appeals; and (3) Plaintiffs maintaining actions before the Federal Court of Claims and San Diego Superior Court. (See SAC ¶¶ 60, 68, 76.) At best, these allegations support a finding that Defendants' acts of contributing money were prompted by their political views and not by racial bias. Accordingly, no reasonable interpretation of Plaintiffs' allegations even suggest that Defendants' acts were motivated by racial discrimination.

Plaintiffs also fail to plead facts suggesting a causal link between intentional discrimination and Defendants' alleged acts. Plaintiffs' SAC only provides that Defendants' acts were "coupled with disparaging racial remarks concerning the Plaintiffs' respective degrees of Indian blood." (SAC ¶¶ 61, 69, 77.) Plaintiffs' SAC is devoid of specific facts supporting an inference of intentional discrimination. Thus, Plaintiffs' bare assertions amount to nothing more than a "naked allegation' of racial discrimination," which do not survive a motion to dismiss. Yusef, 35 F.3d at 714 (citation omitted).

Next, Plaintiffs cite to Evans v. McKay, 869 F.2d 1341 (9th Cir. 1989) in an attempt to preserve their §1981 and § 1982 claims.[fn3] After a careful examination of Evans, the Court finds that Evans is factually distinguishable from this case.

In Evans, plaintiffs of Caucasian descent operated a gas station on the Blackfeet Indian Reservation. The plaintiffs alleged that certain defendants (Bureau of Indian Affairs' ("BIA") members) ordered BIA police and road employees to refrain from purchasing gas from plaintiffs. The plaintiffs further alleged that a Tribal Counsel member (Mountain

Chief) ordered others not to conduct business with plaintiffs. This order was coupled with a statement by Mountain Chief that "whites have no rights on the reservation. Evans, 869 F.2d at 1345.

The Evans court ultimately held that plaintiffs pleaded sufficient facts to defend their §1981 claim against a motion to dismiss. In so doing, the court noted that plaintiffs "have [sufficiently] pleaded overt acts coupled with some direct evidence that the defendants' conduct was motivated by racial animus [to survive a Rule 12(b)(6) motion]." Id., (emphasis supplied). "Plaintiffs must show intentional discrimination on account of race. " Id. at 1344.

Contrary to Evans, in this case Plaintiffs' allegations fail to show that Defendants' conduct was motivated by racial animus. Plaintiffs only allege that Defendants "provid[ed] valuable consideration to a political faction opposed to Plaintiffs ... coupled with disparaging racial remarks concerning the Plaintiffs' respective degrees of Indian blood ... referring to them as 'half blood Indians' and 'a half blood community." (SAC ¶¶ 60-61, 68-69, 76-77.) These allegations differ significantly from the allegations in Evans because the plaintiffs in that case provided direct evidence that defendants were racially motivated in boycotting their business. In Evans, the plaintiffs alleged that defendant Mountain Chief stated "whites have no rights on the reservation." Evans at 1345. Because whites allegedly had no rights on the reservation, defendants ordered everyone to boycott plaintiffs' business. Defendants' motivation to run plaintiffs off the reservation was obviously fueled by racial discrimination. In contrast, Plaintiffs here lack any direct evidence or substantiated allegations of racial discrimination that underlies Defendants' purported actions.

Plaintiffs' allegations, construed in the light most favorable to them, suggest that Defendants' conduct was motivated by political beliefs and not racial animus. There is simply no allegation that Defendants' acts were motivated by intentional racial discrimination. Plaintiffs' allegations of

"half blood Indians" and "a half blood community" amounts to nothing more than a "naked allegation' of racial discrimination." Yusef, 35 F.3d at 714 (citation omitted).

Accordingly, because Plaintiffs failed to sufficiently plead racial discrimination, the Court DISMISSES with prejudice Plaintiffs' civil rights claims. See, e.g. King v. State of California, 784 F.2d 910, 916 (9th Cir. 1986) (affirming dismissal of plaintiff's civil rights claims under 42 U.S.C. §§ 1981, 1982 and 1985 because plaintiff's allegations were conclusory and unsupported by any facts).

B. PLAINTIFFS' FAILURE TO COMPLY WITH THIS COURT'S ORDER

Plaintiffs' failure to comply with this Court's order dated February 1, 2001 further warrants dismissal. It is well settled that a district court has the inherent power to dismiss a case for failure to comply with court orders. See FED. R. Civ. P. 41(b); see also Televideo Systems, Inc., v. Heidenthal, 826 F.2d 915, 916 (9th Cir. 1987).

Here, the Court instructed Plaintiffs to "plead specific facts regarding each Defendants' discriminatory conduct as to each individual Plaintiff." (Mem. Op. & Order dated February 1, 2001 Regarding First Am. Compl. at 11.) However, Plaintiffs only allege that Defendants "provid[ed] valuable consideration to a political faction opposed to Plaintiffs . . . coupled with disparaging racial remarks concerning the Plaintiffs' respective degrees of Indian blood . . . referring to them as 'half blood Indians' and 'a half blood community." (SAC ¶¶ 60-61, 68-69, 76-77.) Plaintiffs' racial allegations are virtually identical to the deficient racial allegations in. Plaintiffs' now dismissed FAC. (See FAC ¶¶ 82, 90, 97.) The Court finds these allegations, at most, vague and ambiguous. Plaintiffs nowhere identify which Defendant made these alleged racial remarks or when they were made.

Because Plaintiffs have failed to plead specific facts regarding each Defendants' racially discriminatory conduct in

violation of this Court's prior order, Plaintiffs' civil rights claims are DISMISSED with prejudice.

B. PLAINTIFFS' STATE LAW CLAIMS MOTION TO AMEND

Next, Plaintiffs formally withdraw their state law claims from the SAC. (See Pls.' Opp'n at 6.) However, Plaintiffs seek leave to amend their SAC to reallege the exact same state law claims for interference with contractual and economic advantage, fraud and negligent misrepresentation under California law. [fn4] (See id.)

Rule 15(a) of the Federal Rules of Procedures provides that after a responsive pleading has been served, a parry may amend its complaint only with leave of court and leave "shall be freely given when justice so requires." FED. R. CIV. P. 15(a). Granting leave to amend rests in the sound discretion of the district court. International Ass'n of Machinists & Aerospace Workers v. Republic Airlines, 761 F.2d 1386, 1390 (9th Cir. 1985). In deciding whether to grant leave to amend, district courts should consider several factors including undue delay, prejudice to the opposing party, futility of the amendment, bad faith and whether plaintiff has previously amended the complaint. Sisseton-Wahpeton Sioux Tribe v. U.S., 90 F.3d 351, 355 (9th Cir. 1996).

Having read and considered the papers submitted, the Court finds that futility of the amendment and Plaintiffs' previous opportunity to amend weigh against granting leave.

1. FUTILITY

First, despite the strong policy in favor of granting leave to amend, "[f]utility of amendment can, by itself, justify the denial of a motion for leave to amend." Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995). Here, Defendants contend that Plaintiffs' proposed amendment is futile because Plaintiffs' state law claims "are based upon the same set of facts as were their prior claims" and have already been dismissed by this Court with prejudice. (Defs.' Opp'n at 3.) The Court agrees.

By order dated February 1, 2001 this Court dismissed Plaintiffs' state law claims with prejudice and without leave to amend for: (1) interference with contractual and economic advantage; (2) fraud; and (3) negligent misrepresentation. Specifically, the Court held that: (1) IGRA and the Compact did not provide Plaintiffs with a private right of action; (2) IGRA preempted Plaintiffs' state law claims; and (3) the Compact did not require the application of California law to Plaintiffs' claims. Plaintiffs now try to reallege these same claims in their SAC.

Plaintiffs have obviously taken their previously invalid state law claims and deleted all reference to IGRA and/or the Compact in an attempt to make the claims whole. Plaintiffs' efforts to trade prior allegations demonstrating that IGRA and the Compact expressly govern this case with "new" vague allegations concerning Defendants' interaction with the Jamul Indian Village are not well taken. The renewed allegations do not create valid and independent state law claims as this Court outlined in its prior order. (See Mem. Op. and Order dated Feb. 4, 2001 Regarding First Am. Compl. at 11 n9.)

For example, Plaintiffs in their FAC allege that Defendants "unlawfully contributed money and other valuable consideration to members and non-members of Jamul, with which they have been bribed to attend meetings, in order to attempt to influence their vote in favor of a Class III gaming ordinance at Jamul" (FAC ¶ 56.) In Plaintiffs' SAC, they now claim that Defendants "unlawfully contribut[ed] money and other valuable consideration to members and non-members of Jamul, with which they have been bribed to attend meetings, in order to attempt to influence their vote in favor of a political faction opposed to Plaintiffs' election to office at the Jamul Indian Village." (SAC ¶¶ 34.) The only factual distinction between these allegations AS their level of specificity. Plaintiffs' FAC describes An detail Defendants' alleged actions. In contrast, Plaintiffs' SAC vaguely describes Defendants' acts in a circuitous attempt to plead around the claims' relation to IGRA and/or the Compact. Plaintiffs'

omission of IGRA and the Compact are particularly surprising here because Plaintiffs alleged in their previous two complaints that their lawsuit specifically involves violations of IGRA and/or the Compact. Plaintiffs cannot now have it both ways.

Furthermore, Plaintiffs cite to IGRA in their jurisdictional allegations, 25 U.S.C. § 2701 et seq. (SAC ¶ 17) and also request this Court to issue an order enjoining Defendants from violating IGRA and/or the Compact. See SAC Prayer for Judgment ¶ 1.) As stated above, the Court previously ruled that Plaintiffs cannot state a cause of action for interference with contractual and economic advantage, fraud and negligent misrepresentation. (See Mem. Op. & Order dated Feb. 1, 2001 Regarding First Am. Compl. at 4-11.) Thus, even if Plaintiffs were provided another chance to amend, Plaintiffs are barred from bringing these same state law claims. In sum, the Court finds that Plaintiffs' proposed amendment would be futile.

2. PREVIOUS AMENDMENTS

Plaintiffs' previous two attempts at amending their Complaint weighs in favor of dismissal. "The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint. " Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990) (citations omitted).

It is implausible and inapposite to suggest that Plaintiffs, represented by capable counsel, must be given a third attempt to allege state law claims that have already been dismissed with prejudice. Accordingly, having weighed the relevant Rule 15(a) factors, the Court DENIES Plaintiffs' motion to amend.

IV. CONCLUSION AND ORDER

In light of the foregoing, the Court GRANTS Defendants' Rule 12(b)(6) motion to dismiss (Doc. No. 47-1)

and DENIES Plaintiffs' motion for leave to amend (Doc. No. 49-1).[fn5]

The Court DISMISSES Plaintiffs' Second Amended Complaint with prejudice and without leave to amend. The Clerk of Court shall close the district court case file.

IT IS SO ORDERED.

DATE: April 18, 2001

Hon. THOMAS J. WHELAN
United States District Court
Southern District of California

CC:HON.LOUISA S. PORTERS UNITED STATES MAGISTRATE JUDGE
ALL PARTIES AND COUNSEL OF RECORD

Footnotes

fn1 Class III gaming is defined as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. 2703(8). Generally, Class I gaming is typically identified as social games solely for prizes of minimal value. See 25 U.S.C. 2703(7)(A).

fn2 For purposes of this motion only, the Court will collectively refer to defendants Kean-Argovitz Resorts, Lake Gaming , Inc., Kean-Argovitz Resorts-Jamul, LLC, and Lakes Kean-Argovitz Resorts-California. LLC as "Defendants." The Defendants primarily engage in casino management.

fn3Plaintiffs cite Means v Wilson, 522 F.2d 833 (8th Cir. 1975) as controlling Ninth Circuit authority to support their § 1985(3) claim. (See Pls.' Opp'n at 12-14.) However, upon further examination by the Court, Means was decided by an Eighth Circuit panel. The Court is not bound or persuaded by Means and declines to follow its reasoning here .

fn4 The Court finds this request perplexing because

Plaintiffs' SAC already alleged interference with contractual and economic advantage, fraud and negligent misrepresentation. If Plaintiffs alleged these same California law violations under IGRA or the Compact, they would be in directly violation of this Court's Order dated February 1, 2001.

fn5 The Court additionally denies the parties' requests for sanctions under Rule 11 of the Federal Rules of Civil Procedure. All pleadings submitted to this Court (1) had bases in law and fact, (2) were the result of reasonable inquiry and (3) were properly motivated. See Cooter & Gell v. Hartmarx. Corp., 496 U.S. 384, 402 (1990); see also FED. R. CIV. P. 11(b). Moreover the Court finds the timing of the parties' sanction requests do not rise to the level warranting the imposition of sanctions in this case.

42 U.S.C. 1985 (3)

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. ...

18 U.S.C. 597

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and

Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote–

Shall be fined under this title or imprisoned not more than

one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.

25 U.S.C. 2710(d)(1) and (2)(A) and (B)

(d) Class III gaming activities; authorization; revocation; Tribal-State compact.

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are–

(A) authorized by an ordinance or resolution that–

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2) (A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that–

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 12(e)(1)(D) [25 USCS § 2711(e)(1)(D)].

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

25 U.S.C. 2711(e)(2)

(e) Disapproval. The Chairman shall not approve any contract if the Chairman determines that– ...

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

TRIBAL-STATE GAMING COMPACT

Between the Jamul Indian Village, a federally recognized Indian Tribe,
and the
STATE OF CALIFORNIA

Sec. 6.1. Gaming Ordinance and Regulations. All Gaming Activities conducted under this Gaming Compact shall, at a minimum, comply with a Gaming Ordinance duly adopted by the Tribe and approved in accordance with IGRA, and with all rules, regulations, procedures, specifications, and standards duly adopted by the Tribal Gaming Agency. ...

Sec. 6.4.5. Gaming Resource Supplier. Any Gaming Resource Supplier who, directly or indirectly, provides, has provided, or is deemed likely to provide at least twenty-five thousand dollars ($25,000) in Gaming Resources in any 12-month period, or who has received at least twenty-five thousand dollars ($25,000) in any consecutive 12-month period within the 24-month period immediately preceding application, shall be licensed by the Tribal Gaming Agency prior to the sale, lease, or distribution, or further sale, lease, or distribution, of any such Gaming Resources to or in connection with the Tribe's Operation or Facility. ...

Sec. 6.4.6. Financial Sources. Any person extending financing, directly or indirectly, to the Tribe's Gaming Facility

or Gaming Operation shall be licensed by the Tribal Gaming Agency prior to extending that financing, provided that any person who is extending financing at the time of the execution of this Compact shall be licensed by the Tribal Gaming Agency within ninety (90) days of such execution. ...

http://www.governor.ca.gov/state/govsite/gov_htmldisplay.jsp?BV_SessionID=@@@@0597148070.1029357326@@@@&BV_EngineID=fadcelfiimmdbemgcfkmchcog.0&sFilePath=%2fgovsite%2fpress_release%2f1999_09%2f091099att.html&sTitle=Tribal_State+Gaming+Compact&sCatTitle=Press+Release

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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WALTER ROSALES, MARIE TOGGERY, and KAREN TOGGERY Plaintiffs, vs. KEAN ARGOVITZ RESORTS, LAKES GAMING, INC., a publicly traded company, KEAN-ARGOVITZ RESORTS-JAMUL, LLC, a Nevada limited liability company, LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, a Delaware limited liability company, and DOES 1-20, Defendants.	)	Case No. 00 CV 1910 W (POR) **SECOND AMENDED COMPLAINT** **1) INTERFERENCE WITH** **2) FRAUD** **3) NEGLIGENT MISREPRESENTATION** **4) CIVIL RIGHTS 42 U.S.C. 1981** **5) CIVIL RIGHTS 42 U.S.C. 1982** **6) CIVIL RIGHTS 42 U.S.C. 1985(3)** **7) DECLARATORY RELIEF** **AND DEMAND FOR JURY**

Plaintiffs allege, pursuant to the Court's February 2, 2001 order, and footnote 9 therein, upon information and belief as follows:

PARTIES, PROPERTIES AND RELATED ACTIONS

1. WALTER ROSALES, MARIE TOGGERY, KAREN TOGGERY, are Indian residents of San Diego County, with half or more degree of California Indian blood, and are enrolled members and residents of the JAMUL INDIAN VILLAGE (hereinafter JAMUL), a tribal governmental entity of Kumeyaay Indians, recognized by Congress, governed by a Constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq., and located in Jamul, California.

2. WALTER ROSALES, MARIE TOGGERY, KAREN TOGGERY, are also appellants, along with fellow JAMUL members, Jane Dumas, Joe Comacho, Gerald Mesa and Robert M. Mesa, in an administrative appeal before the Interior Board of Indian Appeals in Case No. IBIA 00-28-A. There the Plaintiffs seek to set aside the Pacific Regional Director and the So. California Agency Superintendent of the Bureau of Indian Affairs' failure to follow Chief Judge Kathryn Lynn's April 22, 1998 decision as to the membership and leadership of the Jamul Indian Village. There, the IBIA recognized Jane Dumas as the Vice-chairperson of the village, and directed the Pacific Regional Director and the So. Cal. Agency Superintendent to "assist the Village's actual members in addressing their membership and leadership problems in light of this" Board's prior determinations that "neither faction has shown that its elections conformed to the Village's constitution." 32 IBIA 167-68.

3. The IBIA also found on October 26, 1996, in Case No. 97-7-A, that it is a violation of the IBIA's prior rulings for the Regional Director or the Agency Superintendent to recognize subsequent purported election results, until the membership dispute has been resolved; "once an appeal is filed with the [IBIA], the BIA loses jurisdiction over the matter except to participate in the appeal as a party. See

Hammerberg v. Acting Portland Area Director 24 IBIA 78 (1993)."

4. Therefore, since the remand of what the IBIA describes as "the members and leadership"dispute has not reached a final decision, even yet, the only government of the Jamul Indian Village that has been lawfully recognized by the ranking member of the U.S. government and the Department of Interior is that elected by the Jamul Indian Village General Council in 1992.

5. WALTER ROSALES, MARIE TOGGERY, Jane Dumas, Val Mesa, Joe Comacho, Bernice Mesa, Vivian Flores, Leslie A. Mesa, Gerald Mesa, Robert M. Mesa, and William Mesa, and the Jamul Indian Village, through its duly elected chairperson, WALTER ROSALES, are also Plaintiffs before the U.S. Court of Federal Claims, Case No. 98-860-L. This action seeks damages against the U.S. government for breach of contract, breach of fiduciary duty, breach of trust, interference with contract and prospective economic advantage, taking, accounting, and violations of civil rights. The action was stayed on April 19, 2000, pending the outcome of the IBIA Case No. 00-28-A. Tribal Judge KAREN TOGGERY is not a plaintiff in the Court of Claims action, since the government's failure to give her Tribal court judgment full faith and credit against certain residents and non-residents of the Village remains at issue in that case.

6. Plaintiffs are informed and believe and on such information and belief allege that the Jamul Indian Village sits on two parcels of land, recorded by the San Diego County Recorder under the numbers 597-080-01 and 597-080-02, neither of which has ever been established as an Indian reservation by the U.S. government; no executive order, U.S. treaty or act of Congress has established an Indian reservation for the Jamul Indian Village at any location in the United States, despite Congressional recognition of the village as a governmental entity of Kumeyaay Indians in 1981.

7. Under the terms of the grant deed from Lawrence and Donald Daley, dated December 12, 1978, parcel 597-080-01, consisting of approximately 4.66 acres, was accepted by "the United States of America in trust for such Jamul Indians

of one-half degree or more Indian blood as the Secretary of the Interior may designate." However, this deed was recorded nearly three years before Congress recognized the Constitution of the Jamul Indian Village under the Indian Reorganization Act of 1934, and the Secretary of the Interior has never designated any Jamul Indians of one-half degree or more Indian blood.

8. Under the terms of the grant deed from the Roman Catholic Bishop of San Diego, dated May 25, 1982, parcel 597-080-02, consisting of approximately 1.372 acres, was accepted by "the United States of America in trust for the Jamul Indian Village." However, the grantor reserved "to himself and his successors or assigns an easement for (1) utility service lines and (2) ingress and egress over the existing well-traveled road," which extends the entire length of the 1.372 acres from California State Highway 94 to the Indian cemetery, consisting of approximately .838 acre, to which the Catholic Church retains title.

9. KEAN ARGOVITZ RESORTS, is a business entity of unknown origin, with a principal place of business 11999 Katy Freeway #322, Houston, Texas, 77079, doing business in San Diego County.

10. LAKES GAMING, INC. is a publicly held management company, with a principal place of business at 130 Chesire Lane, Minnetonka, Minnesota, 55305, which is doing business in San Diego County.

11. KEAN-ARGOVITZ RESORTS-JAMUL, LLC, is a Nevada limited liability company with its principal place of business in Houston, Texas.

12. LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, is a Delaware limited liability company with its principal place of business in Minneapolis, Minnesota.

13. Defendants Does 1 through 20, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to Plaintiffs at this time. When the true names and capacities of said defendants are ascertained by Plaintiffs, Plaintiffs will seek leave to amend this

complaint to insert their true names and capacities. Plaintiffs are informed and believe, and based thereon allege, that each of the fictitiously named defendants is responsible in some measure for the actions, events and damages herein alleged, and are the agents of each of the defendants.

14. Plaintiffs are informed and believe and on such information and belief allege that at all times herein mentioned, defendants, and each of them, were the agent, employee and/or joint venturer of their co-defendants, and were acting within the course and scope of such agency, employment and/or joint venture and with the permission and consent of their co-defendants and defendants. Each reference to one defendant is also a reference to each and every other defendant.

15. Plaintiffs are informed and believe and thereon allege that the defendants, and each of them, conspired with each other, to engage in acts in furtherance of a conspiracy to wrongfully and illegally violate the Plaintiffs' contract, property and civil rights under the U.S. and JAMUL INDIAN VILLAGE Constitutions and laws, rendering each of the defendants jointly and severally liable for all resulting damages to Plaintiffs.

16. Plaintiffs are informed and believe and thereon allege that KEAN ARGOVITZ RESORTS, and LAKES GAMING, INC., and certain DOES 1-5, are personally liable for all amounts owed by KEAN-ARGOVITZ RESORTS-JAMUL, LLC, and LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, because they are the alter ego of these entities. The alter ego relationship exists because there is such unity of interest and ownership that the separate personalities of KEAN-ARGOVITZ RESORTS-JAMUL, LLC, and LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, no longer exist. The observance of the fiction of separate existence would, under the circumstances, sanction fraud and promote injustice. Since there is a commonality of the characteristics between any two or more entities, those entities are deemed to be a single entity.

JURISDICTION

17. Jurisdiction is alleged pursuant to 28 U.S.C. 1331, federal question, 28 U.S.C. 1332, diversity jurisdiction, 28 U.S.C. 1343, civil rights and elective franchise, 28 U.S.C. 1360, civil causes of action to which Indians are parties, which arise in the areas of Indian country in California, to the same extent that California has jurisdiction over other civil causes of action and those civil laws of California that are of general application to private persons or private property, 28 U.S.C. 2201, declaratory judgments, 18 U.S.C. 1151, claims arising in Indian country, 18 U.S.C. 597, expenditures to influence federal elections, 25 U.S.C. 81, contracts with Indian tribes or Indians, 25 U.S.C. 2701-2721, the Indian Gaming Regulatory Act, and 42 U.S.C. 1981, 1982, and 1985, civil rights statutes.

GENERAL ALLEGATIONS

18. Since on or about September 30, 1999, the defendants have been knowingly and willfully providing materially important false statements or information to the members and residents of JAMUL, and those outside JAMUL, including but not limited to the following: (1) that the Defendants are permitted to provide consideration, including but not limited to, cash contributions reported to be $100,000 per month, in an attempt to influence those voting in federal elections at the Jamul Indian Village; and (2) that the Defendants are permitted to make such contributions contingent upon the infringement of the contract and property rights of the Plaintiffs' election to office at the Jamul Indian Village, and who support the Plaintiffs' prosecution of the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court. The Plaintiffs by their affirmative acts supporting their 1995, 1997, and 1999 election to office at the Jamul Indian Village, and their affirmative acts in prosecuting the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court, are a class against whom the Defendants discriminated against, because of their class membership.

19. Since on or about September 30, 1999, the Defendants have been unduly interfering and influencing, and attempting to unduly interfere or influence, for their gain or advantage, the Plaintiffs' quiet enjoyment of their contract and property rights. The Defendants are providing valuable consideration to a political faction opposed to the Plaintiffs holding office, and opposed to the Plaintiffs' prosecution of the above referenced IBIA appeals, and the actions before the Federal Court of Claims, and the San Diego Superior Court, contingent upon the political faction depriving the Plaintiffs' of their homes, forcefully denying the Plaintiffs' rights to quiet enjoyment of the deed restrictions placed on the land on which they reside by the grantors of that property, and depriving the Plaintiffs of their federal benefits as Native Americans. The Plaintiffs by their affirmative acts supporting their 1995, 1997, and 1999 election to office at the Jamul Indian Village, and their affirmative acts in prosecuting the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court, are a class against whom the Defendants discriminated against, because of their class membership.

20. Since on or about September 30, 1999, the Defendants have been providing valuable consideration to a political faction opposed to the Plaintiffs holding office, and opposed to the Plaintiffs' prosecution of the above referenced IBIA appeals, and the actions before the Federal Court of Claims, and the San Diego Superior Court, whose members have, verbally threatened the Plaintiffs and their children with physical harm on more than one occasion, used racially derogatory and ancestral slurs against the Plaintiffs to harass and intimidate them, thrown rocks at the windows of Plaintiffs' houses and vehicles, and who are believed to have burned down one of the Plaintiffs' trailers and set a truck on fire adjacent to another Plaintiff's house. The Plaintiffs by their affirmative acts supporting their 1995, 1997, and 1999 election to office at the Jamul Indian Village, and their affirmative acts in prosecuting the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court, are a class against whom the Defendants discriminated against, because of their class

membership.

21. Since on or about September 30, 1999, the Defendants have been unlawfully contributing money and other valuable consideration to members and non-members of JAMUL, with which they have been bribed to attend meetings, in order to attempt to influence their vote in favor of a political faction opposed to Plaintiffs' election to office at the Jamul Indian Village, and the Plaintiffs' prosecution of the above referenced actions. The Plaintiffs by their affirmative acts supporting their 1995, 1997, and 1999 election to office at the Jamul Indian Village, and their affirmative acts in prosecuting the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court, are a class against whom the Defendants discriminated against, because of their class membership.

22. Since on or about September 30, 1999, the defendants have been continuously depriving the Plaintiffs of their civil rights, including, but not limited to, the right to due process and the full and equal benefit of all laws and Constitutions of the U.S. and JAMUL, and the right to vote, due to their age, ancestry and opposition to the defendants' political agenda in support of the political faction opposed to the Plaintiffs' election to the Jamul Indian Village executive committee, and the Plaintiffs' prosecution of the above referenced actions, in violation of 42 U.S.C. 1981, 1982, and 1985.

23. In addition to the aforedescribed acts of defendants, they have interfered with the Plaintiffs' lawful the use their federal Indian benefits, and have interfered with the voting rights of the Plaintiffs.

24. These acts by the defendants have caused the Plaintiffs severe property damage, consequential damages, physical and bodily injury, including severe emotional distress, all in excess of the jurisdictional limit of this court, subject to proof at trial. These acts have unduly interfered with the Plaintiffs' contract and property rights to the quiet enjoyment of their residences, and interfered with the Plaintiffs' civil rights to due process and equal protection of the laws, including their right to exercise their elective

franchise free from undue influence.

25. Plaintiffs have been greatly and irreparably damaged by reason of Defendants' infringement and violation of their contract, property and civil rights, and unless Defendants are enjoined by this court, they will continue their violation of Plaintiffs' contract, property and civil rights, further irreparably harming the Plaintiffs.

26. As a result of the wrongful conduct of the defendants as herein alleged, Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent great and irreparable injury resulting from the infringement and violation of their contract, property and civil rights, from the likelihood that Defendants will be unable to respond in damages, and from the difficulty or impossibility to ascertain the exact amount of personal bodily injury and property damage Plaintiffs have sustained, and will in the future sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated in damages and Plaintiffs are without an adequate remedy at law without the imposition of the requested equitable injunctive relief.

FIRST CLAIM FOR RELIEF

(Interference with Contractual Relations and Prospective Economic Advantage)

27. Plaintiffs incorporate by reference paragraphs 1 through 26 of this complaint as though fully set forth herein.

28. Plaintiffs are informed and believe that Defendants are and were aware of the contractual relationships and potential economic advantage of the business relationships among the Plaintiffs, the enrolled members of JAMUL, and others outside the village, including the U.S. Dept. of Interior, the Bureau of Indian Affairs, the Dept. of Housing and Urban Development, the National Indian Gaming Commission, various other gaming management companies, housing contractors and JAMUL's banks in conducting business with Plaintiffs and the enrolled members of JAMUL. These contracts and economically

advantageous relationships include, but are not limited to, the following:

a. Contract CTJ54T57505 for Housing and Improvement Program under P.L. 93-638;

b. Grant GTJ54T57512 for Aid to Tribal Government;

c. Reprogramming of Indian Child Welfare funds into Aid to Tribal Government Grant GTJ54T5712;

d. Grant GTJ54T57513 for Community Fire Protection Program;

e. Department of Education Basic Grant for Library;

f. Community Development Block Grant B-92-SR-06-0911 with the Department of Housing and Urban Development and the accompanying grant from the Department of Health and Human Services and Indian Health Service, for professional assistance for sanitation facilities;

g. Lease between Jamul Indian Village and the San Diego County Rural Fire District for parcel 597-060-04;

h. Contract to occupy and quietly enjoy the use of a residence at the Jamul Indian Village;

i. Contract with the successor to San Diego Gas & Electric Co. for electric service to the residences at the Jamul Indian Village;

j. Contract with Southern Indian Health for septic and sanitation services for the residences at the Jamul Indian Village;

k. Contract with Otay Water District for water service to the residences at the Jamul Indian Village;

1. Easement with the State of California for use of State Highway 94 for ingress and egress to the residences at the Jamul Indian Village;

m. Contract with Pacific Bell for telephone service to the residences at the Jamul Indian Village;

n. Contract with the U.S. Postal Service for mail delivery to the residences at the Jamul Indian Village;

o. Contract for transfer of parcel 597-060-04;

p. Negotiations with Warren J. Dedrick for purchase of parcel Ag. Pr. C, approximately 68.16 acres;

q. Negotiations with the Baldwin Company for purchase of parcel 597-060-05.

r. Negotiations with Greg Smith, or any representative of Greg Smith for purchase of parcel 597-060-05;

s. Negotiations with the Daley Corporation, or any representative of the Daley Corporation, Lawrence Daly, and/or Don Daley, concerning parcels 597-080-01 and 597-080-02; t. Negotiations with the representatives of Otay Land Company, sometimes referred to as Otay Land CX LLC, regarding land in Jamul;

u. Negotiations with the representatives of Stephen & Mary Birch Foundation, regarding land in Jamul;

v. Negotiations with the representatives of Otay Project LLC, regarding land in Jamul;

w. Negotiations with the representatives of New Millennium Homes, regarding land in Jamul;

x. Negotiations with the representatives of Jewels of Charity, regarding land in Jamul;

y. Negotiations with the representatives of Marion Community Inc., regarding land in Jamul;

z. Negotiations with the representatives of United Enterprises, regarding land in Jamul;

aa. Negotiations with the representatives of U.S. Fish & Wildlife Service, regarding the San Diego County Multiple Species Conservation Plan, and the Rancho Jamul Ecological Reserve, and the U.S. San Diego National Wildlife Refuge.

bb. Negotiations with the representatives of

California Fish and Game Department, regarding the San Diego County Multiple Species Conservation Plan, and the Rancho Jamul Ecological Reserve, and the U.S. San Diego National Wildlife Refuge;

cc. Contract with Florence Shipek, regarding anthropological research for the residents of the Jamul Indian Village;

dd. Contracts relating to any transfer of Parcel Nos. 597-080-01, 597-080-02, 597-080-03, 597-080-04, 597-080-05, 597-080-06, 597-060-04, and 597-042-13-00, as recorded in San Diego County, California, to the United States;

29. Plaintiffs had a reasonable expectation of continuing said contracts and economically advantageous relationships.

30. Plaintiffs are informed and believe that Defendants have at times negligently, and at other times willfully and knowingly, taken overt actions which have resulted, and will result, in the impairment of said contractual and prospective economically advantageous relationships.

31. Since on or about September 30, 1999, the defendants have been knowingly and willfully providing materially important false statements or information to the members and residents of JAMUL, and those outside JAMUL, including but not limited to the following: (1) that the Defendants are permitted to provide consideration, including but not limited to, cash contributions reported to be $100,000 per month, in an attempt to influence those voting in federal elections at the Jamul Indian Village; and (2) that the Defendants are permitted to make such contributions contingent upon the infringement of the contract and property rights of the Plaintiffs' election to office at the Jamul Indian Village, and who support the Plaintiffs' prosecution of the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court. The Plaintiffs by their affirmative acts supporting their 1995, 1997, and 1999 election to office at the Jamul Indian Village, and their affirmative acts in prosecuting the above referenced IBIA appeals, and the actions before the Federal Court of

Claims and the San Diego Superior Court, are a class against whom the Defendants discriminated against, because of their class membership.

32. Since on or about September 30, 1999, the Defendants have been unduly interfering and influencing, and attempting to unduly interfere or influence, for their gain or advantage, the Plaintiffs' quiet enjoyment of their contract and property rights. The Defendants are providing valuable consideration to a political faction opposed to the Plaintiffs holding office, and opposed to the Plaintiffs' prosecution of the above referenced IBIA appeals, and the actions before the Federal Court of Claims, and the San Diego Superior Court, contingent upon the political faction depriving the Plaintiffs' of their homes, forcefully denying the Plaintiffs' rights to quiet enjoyment of the deed restrictions placed on the land on which they reside by the grantors of that property, and depriving the Plaintiffs of their federal benefits as Native Americans. The Plaintiffs by their affirmative acts supporting their 1995, 1997, and 1999 election to office at the Jamul Indian Village, and their affirmative acts in prosecuting the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court, are a class against whom the Defendants discriminated against, because of their class membership.

33. Since on or about September 30, 1999, the Defendants have been providing valuable consideration to a political faction opposed to the Plaintiffs holding office, and opposed to the Plaintiffs' prosecution of the above referenced IBIA appeals, and the actions before the Federal Court of Claims, and the San Diego Superior Court, whose members have, verbally threatened the Plaintiffs and their children with physical harm on more than one occasion, used racially derogatory and ancestral slurs against the Plaintiffs to harass and intimidate them, thrown rocks at the windows of Plaintiffs' houses and vehicles, and who are believed to have burned down one of the Plaintiffs' trailers and set a truck on fire adjacent to another Plaintiff's house. The Plaintiffs by their affirmative acts supporting their 1995, 1997, and 1999 election to office at the Jamul Indian Village, and their affirmative acts in prosecuting the above referenced IBIA

appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court, are a class against whom the Defendants discriminated against, because of their class membership.

34. Since on or about September 30, 1999, the Defendants have been unlawfully contributing money and other valuable consideration to members and non-members of JAMUL, with which they have been bribed to attend meetings, in order to attempt to influence their vote in favor of a political faction opposed to Plaintiffs' election to office at the Jamul Indian Village, and the Plaintiffs' prosecution of the above referenced actions. The Plaintiffs by their affirmative acts supporting their 1995, 1997, and 1999 election to office at the Jamul Indian Village, and their affirmative acts in prosecuting the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court, are a class against whom the Defendants discriminated against, because of their class membership.

35. Since on or about September 30, 1999, the defendants have been continuously depriving the Plaintiffs of their civil rights, including, but not limited to, the right to due process and the full and equal benefit of all laws and Constitutions of the U.S. and JAMUL, and the right to vote, due to their age, ancestry and opposition to the defendants' political agenda in support of the political faction opposed to the Plaintiffs' election to the Jamul Indian Village executive committee, and the Plaintiffs' prosecution of the above referenced actions, in violation of 42 U.S.C. 1981, 1982, and 1985.

36. In addition to the afore described acts of defendants, they have interfered with the Plaintiffs' lawful the use their federal Indian benefits, and have interfered with the voting rights of the Plaintiffs.

37. As a result of Defendants' interference with contractual relations and prospective economic advantage, Plaintiffs have suffered both general and consequential damages in an amount in excess of the jurisdiction of this court, subject to proof at trial, including but not limited to the damage to reputation, property, business, trade, profession

and occupation, physical and bodily injury, including but not limited to, anxiety, humiliation, shock, emotional distress, mental anguish and related mental and physical injury, and any and all attorneys' fees, costs and expenses incurred in prosecuting this action.

38. At the time the defendants engaged in the conduct alleged herein, they were guilty of intentional conduct, conscious disregard of the Plaintiffs' rights, malice, fraud, and/or oppression. Defendants were possessed of the full knowledge as to the rights and interests of the Plaintiffs described herein and defendants acted in reckless indifference to and with wanton disregard of Plaintiffs' rights in doing the acts described herein. By reason of these acts, Plaintiffs are entitled to punitive and exemplary damages against the Defendants in an amount according to proof at the time of trial.

39. Plaintiffs are informed and believe and thereon allege that if not permanently enjoined, the Defendants will continue to so interfere with Plaintiffs' contractual relations and prospective economic advantage, and continue to induce others to so interfere.

40. As a result of the wrongful conduct of the defendants as herein alleged, Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent great and irreparable injury resulting from said interference with Plaintiffs' contractual relations and prospective economic advantage, from the irreparable injury to Plaintiffs, from the unfair advantage defendants will be permitted to obtain over Plaintiffs, from the likelihood that Defendants will be unable to respond in damages, and from the difficulty or impossibility to ascertain the exact amount of damage Plaintiffs have, and will in the future sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated in damages and Plaintiffs are without an adequate remedy at law without the imposition of the requested equitable injunctive relief.

SECOND CLAIM FOR RELIEF

(Fraud)

41. Plaintiffs incorporate by reference paragraphs 1 through 40 of this complaint as though fully set forth herein.

42. Plaintiffs are informed and believe and thereupon allege that Defendants have misrepresented to the Plaintiffs, enrolled members of JAMUL, and others not members of JAMUL: (1) that the Defendants are permitted to provide consideration, including, but not limited to, cash contributions reported to be $100,000 per month, in an attempt to influence those voting in federal elections at the Jamul Indian Village, and (2) that the Defendants are permitted to provide such consideration contingent upon the infringement of the contract and property rights of those members and residents of JAMUL, who support Plaintiffs' election to office at the Jamul Indian Village, and who support the Plaintiffs' prosecution of the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court. These representations were not true when made.

43. Plaintiffs are informed and believe that Defendants knew that these representations, oral and written, were material to Plaintiffs, and others outside JAMUL, including the U.S. Dept. of Interior, the Bureau of Indian Affairs, the Dept. of Housing and Urban Development, the National Indian Gaming Commission, various housing contractors and JAMUL's banks in conducting business with Plaintiffs and the enrolled members of JAMUL.

44. Plaintiffs are informed and believe that Defendants knew that these representations were not true when made.

45. Plaintiffs and the recipients of these misrepresentations did not know, and had no reasonable means of verifying, that these representations were not true.

46. Plaintiffs are informed and believe that these representations were made by Defendants to induce Plaintiffs and the recipients to rely on them, and that they did in fact

rely upon these representations in doing business with the enrolled members of JAMUL, and other non-members of JAMUL.

47. As a result of Defendants' fraud, Plaintiffs have suffered both general and consequential damages in an amount in excess of the jurisdiction of this court, subject to proof at trial, including but not limited to the damage to reputation, property, business, trade, profession and occupation, physical and bodily injury, including but not limited to, anxiety, humiliation, shock, emotional distress, mental anguish and related mental and physical injury, and any and all attorneys' fees, costs and expenses incurred in prosecuting this action.

48. At the time the defendants engaged in the conduct alleged herein, they were guilty of intentional conduct, conscious disregard of the Plaintiffs' rights, malice, fraud, and/or oppression. Defendants were possessed of the full knowledge as to the rights and interests of the Plaintiffs described herein and defendants acted in reckless indifference to and with wanton disregard of Plaintiffs' rights in doing the acts described herein. By reason of these acts, Plaintiffs are entitled to punitive and exemplary damages against the Defendants in an amount according to proof at the time of trial.

49. Plaintiffs have been greatly and irreparably damaged by reason of Defendants' misrepresentations, and unless Defendants are enjoined by this court, they will continue their violation of Plaintiffs' rights further irreparably harming the Plaintiffs.

50. As a result of the wrongful conduct of the defendants as herein alleged, Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent great and irreparable injury resulting from the infringement and violation of their rights, from the likelihood that Defendants will be unable to respond in damages, and from the difficulty or impossibility to ascertain the exact amount of personal bodily injury and property damage Plaintiffs have, and will in the future, sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated

in damages and Plaintiffs are without an adequate remedy at law without the imposition of the requested equitable injunctive relief.

THIRD CLAIM FOR RELIEF

(Negligent Misrepresentation)

51. Plaintiffs incorporate by reference paragraphs 1 through 50 of this complaint as though fully set forth herein.

52. Plaintiffs are informed and believe that Defendants negligently misrepresented to the Plaintiffs and enrolled members of JAMUL, and others not members of JAMUL: (1) that the Defendants are permitted to provide consideration, including, but not limited to, cash contributions reported to be $100,000 per month, in an attempt to influence those voting in federal elections at the Jamul Indian Village, and (2) that the Defendants are permitted to provide such consideration contingent upon the infringement of the contract and property rights of those members and residents of JAMUL, who support Plaintiffs' election to office at the Jamul Indian Village, and who support the Plaintiffs' prosecution of the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court. These misrepresentations were made without reasonable grounds for believing that they were true.

53. Plaintiffs are informed and believe that Defendants knew, or should have known, that these alleged representations, oral and written, to Plaintiffs and the recipients, were material to

Plaintiffs, and others outside JAMUL, including the U.S. Dept. of Interior, the Bureau of Indian Affairs, the Dept. of Housing and Urban Development, the National Indian Gaming Commission, various housing contractors and JAMUL's banks in conducting business with Plaintiffs and the enrolled members of JAMUL.

54. Plaintiffs and the recipients of these misrepresentations did not know, and had no reasonable

means of verifying, that these representations were not true.

55. Plaintiffs are informed and believe that these representations were negligently made by Defendants to induce Plaintiffs and the recipients to rely on them, and that they did in fact rely upon these representations in doing business with the enrolled members of JAMUL, and other non-members of JAMUL.

56. As a result of Defendants' negligent misrepresentations, Plaintiffs have suffered both general and consequential damages in an amount in excess of the jurisdiction of this court, subject to proof at trial, including but not limited to the damage to reputation, property, business, trade, profession and occupation, physical and bodily injury, including but not limited to, anxiety, humiliation, shock, emotional distress, mental anguish and related mental and physical injury, and any and all attorneys' fees, costs and expenses incurred in prosecuting this action.

57. Plaintiffs have been greatly and irreparably damaged by reason of Defendants' misrepresentations, and unless Defendants are enjoined by this court, they will continue their violation of Plaintiffs' rights further irreparably harming the Plaintiffs.

58. As a result of the wrongful conduct of the defendants as herein alleged, Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent great and irreparable injury resulting from the infringement and violation of their rights, from the likelihood that Defendants will be unable to respond in damages, and from the difficulty or impossibility to ascertain the exact amount of personal bodily injury and property damage Plaintiffs have, and will in the future, sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated in damages and Plaintiffs are without an adequate remedy at law without the imposition of the requested equitable injunctive relief.

FOURTH CLAIM FOR RELIEF

(Civil Rights-Equal Protection-Section 1981)

58. Plaintiffs incorporate by reference paragraphs 1 through 58 of this complaint as though fully set forth herein.

59. Defendants by doing the overt acts alleged herein, and providing valuable consideration to a political faction opposed to the Plaintiffs holding office, and opposed to the Plaintiffs' prosecution of the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court, contingent upon the infringement of the Plaintiffs' contract rights, have violated 25 U.S.C. 1302(8), and 42 U.S.C. 1981, by depriving the Plaintiffs of their civil rights, including the right to make and enforce contracts, the right to full and equal benefit of all laws and proceedings for the security of persons and property, and the right to vote, as are enjoyed by white citizens, due to their age, ancestry and opposition to the Defendants' political agenda in support of the political opponents of the Plaintiffs. The Plaintiffs by their affirmative acts supporting their 1995, 1997, and 1999 election to office at the Jamul Indian Village, and their affirmative acts in prosecuting the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court, are a class against whom the Defendants discriminated against, because of their class membership.

60. Defendants' overt acts violating 25 U.S.C. 1302(8) and 42 U.S.C. 1981, have been coupled with disparaging racial remarks concerning the Plaintiffs' respective degrees of Indian blood, including but not limited to referring to them as "half blood Indians", and "a half blood community," and seeking to have them wrongfully evicted from their homes, and denied their possessory rights to their federal benefits.

61. In addition to the afore described acts of defendants, they have interfered with, the Plaintiffs' uses of their federal benefits, and have interfered with the voting rights of the Plaintiffs.

62. As a result of Defendants' wrongful discriminatory infringement of Plaintiffs' civil rights,

Plaintiffs have suffered both general and consequential damages in an amount in excess of the jurisdiction of this court, subject to proof at trial, including but not limited to the damage to reputation, property, business, trade, profession and occupation, physical and bodily injury, including but not limited to, anxiety, humiliation, shock, emotional distress, mental anguish and related mental and physical injury, and any and all attorneys' fees, costs and expenses incurred in prosecuting this action.

63. At the time the defendants engaged in the conduct alleged herein, they were guilty of intentional conduct, conscious disregard of the Plaintiffs' rights, malice, fraud, and/or oppression. Defendants were possessed of the full knowledge as to the rights and interests of the Plaintiffs described herein and defendants acted in reckless indifference to and with wanton disregard of Plaintiffs' rights in doing the acts described herein. By reason of these acts, Plaintiffs are entitled to punitive and exemplary damages against the Defendants in an amount according to proof at the time of trial.

64. Plaintiffs have been greatly and irreparably damaged by reason of Defendants' conduct, and unless Defendants are enjoined by this court, they will continue their violation of Plaintiffs' rights further irreparably harming the Plaintiffs.

65. As a result of the wrongful conduct of the defendants as herein alleged, Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent great and irreparable injury resulting from the infringement and violation of their rights, from the likelihood that Defendants will be unable to respond in damages, and from the difficulty or impossibility to ascertain the exact amount of personal bodily injury and property damage Plaintiffs have, and will in the future, sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated in damages and Plaintiffs are without an adequate remedy at law without the imposition of the requested equitable injunctive relief.

FIFTH CLAIM FOR RELIEF

(Civil Rights-Property Rights-Section 1982)

66. Plaintiffs incorporate by reference paragraphs 1 through 66 of this complaint as though fully set forth herein.

67. Defendants, by doing the overt acts alleged herein, and providing valuable consideration to a political faction opposed to the Plaintiffs holding office, and opposed to the Plaintiffs' prosecution of the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court, contingent upon the infringement of the Plaintiffs' property rights, have violated 25 U.S.C. 1302(8) and 42 U.S.C. 1982, by depriving the Plaintiffs of their civil rights, including the right to equally occupy and enjoy real and personal property, as are enjoyed by white citizens, due to their age, ancestry and opposition to the Defendants' political agenda in support of the political opponents of the Plaintiffs. The Plaintiffs by their affirmative acts supporting their 1995, 1997, and 1999 election to office at the Jamul Indian Village, and their affirmative acts in prosecuting the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court, are a class against whom the Defendants discriminated against, because of their class membership.

68. Defendants' overt acts violating 25 U.S.C. 1302(8) and 42 U.S.C. 1982, have been coupled with disparaging racial remarks concerning the Plaintiffs' respective degrees of Indian blood, including but not limited to referring to them as "half blood Indians", "a half blood community," and seeking to have them wrongfully evicted from their homes, and possessory rights in their federal property benefits.

69. In addition to the afore described acts of defendants, they have interfered with the Plaintiffs' uses of their federal benefits, and have interfered with the voting rights of the Plaintiffs.

70. As a result of Defendants' wrongful discriminatory infringement of Plaintiffs' civil rights, Plaintiffs have suffered both general and consequential damages in an amount in excess of the jurisdiction of this

court, subject to proof at trial, including but not limited to the damage to reputation, property, business, trade, profession and occupation, physical and bodily injury, including but not limited to, anxiety, humiliation, shock, emotional distress, mental anguish and related mental and physical injury, and any and all attorneys' fees, costs and expenses incurred in prosecuting this action.

71. At the time the defendants engaged in the conduct alleged herein, they were guilty of intentional conduct, conscious disregard of the Plaintiffs' rights, malice, fraud, and/or oppression. Defendants were possessed of the full knowledge as to the rights and interests of the Plaintiffs described herein and defendants acted in reckless indifference to and with wanton disregard of Plaintiffs' rights in doing the acts described herein. By reason of these acts, Plaintiffs are entitled to punitive and exemplary damages against the Defendants in an amount according to proof at the time of trial.

72. Plaintiffs have been greatly and irreparably damaged by reason of Defendants' conduct, and unless Defendants are enjoined by this court, they will continue their violation of Plaintiffs' rights further irreparably harming the Plaintiffs.

73. As a result of the wrongful conduct of the defendants as herein alleged, Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent great and irreparable injury resulting from the infringement and violation of their rights, from the likelihood that Defendants will be unable to respond in damages, and from the difficulty or impossibility to ascertain the exact amount of personal bodily injury and property damage Plaintiffs have, and will in the future, sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated in damages and Plaintiffs are without an adequate remedy at law without the imposition of the requested equitable injunctive relief.

SIXTH CLAIM FOR RELIEF

(Civil Rights-Equal Protection Conspiracy-Section 1985(3))

73. Plaintiffs incorporate by reference paragraphs 1 through 74 of this complaint as though fully set forth herein.

74. Defendants by doing the overt acts alleged herein, and providing valuable consideration to a political faction opposed to the Plaintiffs holding office, and opposed to the Plaintiffs' prosecution of the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court, contingent upon the infringement of the Plaintiffs' contract and property rights, have violated 25 U.S.C. 1302(8), and 42 U.S.C. 1985(3), by conspiring to deprive Plaintiffs of their civil rights, including the equal protection of the laws and equal privileges and immunities under the law, and the right to vote, due to their age, ancestry, and opposition to Defendants' political agenda in support of the political opponents of the Plaintiffs. The Plaintiffs by their affirmative acts supporting their 1995, 1997, and 1999 election to office at the Jamul Indian Village, and their affirmative acts in prosecuting the above referenced IBIA appeals, and the actions before the Federal Court of Claims and the San Diego Superior Court, are a class against whom the Defendants discriminated against, because of their class membership.

75. Defendants' overt acts violating 25 U.S.C. 1302(8) and 42 U.S.C. 1985(3), have been coupled with disparaging racial remarks concerning the Plaintiffs' respective degrees of Indian blood, including but not limited to referring to them as "half blood Indians", "a half blood community," and seeking to have them wrongfully evicted from their homes, and denied their possessory rights in their federal benefits.

76. In addition to the afore described acts of defendants, they have interfered with the Plaintiffs' uses of their federal benefits, and have interfered with the voting rights of the Plaintiffs.

77. As a result of Defendant's wrongful discriminatory infringement of Plaintiffs' civil rights, Plaintiffs have suffered both general and consequential

damages in an amount in excess of the jurisdiction of this court, subject to proof at trial, including but not limited to the damage to reputation, property, business, trade, profession and occupation, physical and bodily injury, including but not limited to, anxiety, humiliation, shock, emotional distress, mental anguish and related mental and physical injury, and any and all attorneys' fees, costs and expenses incurred in prosecuting this action.

78. At the time the defendants engaged in the conduct alleged herein, they were guilty of intentional conduct, conscious disregard of the Plaintiffs' rights, malice, fraud, and/or oppression. Defendants were possessed of the full knowledge as to the rights and interests of the Plaintiffs described herein and defendants acted in reckless indifference to and with wanton disregard of Plaintiffs' rights in doing the acts described herein. By reason of these acts, Plaintiffs are entitled to punitive and exemplary damages against the Defendants in an amount according to proof at the time of trial.

79. Plaintiffs have been greatly and irreparably damaged by reason of Defendant's conduct, and unless Defendant is enjoined by this court, he will continue his violation of Plaintiffs' rights further irreparably harming the Plaintiffs.

80. As a result of the wrongful conduct of the defendant as herein alleged, Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent great and irreparable injury resulting from the infringement and violation of their rights, from the likelihood that Defendant will be unable to respond in damages, and from the difficulty or impossibility to ascertain the exact amount of personal bodily injury and property damage Plaintiffs have, and will in the future, sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated in damages and Plaintiffs are without an adequate remedy at law without the imposition of the requested equitable injunctive relief.

SEVENTH CLAIM FOR RELIEF

(Injunctive and Declaratory Relief- 28 U.S.C. 1343 and 2201)

81. Plaintiffs incorporate by reference paragraphs 1 through 82 of this complaint as though fully set forth herein.

82. An actual controversy has arisen and now exists between Plaintiffs and Defendants regarding their respective rights, duties and obligations in that Plaintiffs contend that Defendants are liable to Plaintiffs for the statutory, contractual, and tortious deprivations of their contractual and property rights, and their Constitutional and civil rights alleged herein, and defendants deny such liability to Plaintiffs.

83. Plaintiffs desire a judicial determination of the respective rights of Plaintiffs and Defendants.

84. Such a declaration is necessary and appropriate at this time so that the parties may ascertain their rights and duties with respect to each other.

85. Plaintiffs have been greatly and irreparably damaged by reason of said Defendant's statutory, contractual, and tortious deprivations of Plaintiffs' contractual and property rights, and their Constitutional and civil rights alleged herein, and unless Defendants are enjoined by this court, they will continue the violation of Plaintiffs' rights further irreparably harming the Plaintiffs.

86. As a result of the wrongful conduct of said defendants as herein alleged, Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent great and irreparable injury resulting from the infringement and violation of their Constitutional and civil rights, from the likelihood that Defendants will be unable to respond in damages, and from the difficulty or impossibility to ascertain the exact amount of personal bodily injury and property damage Plaintiffs have, and will in the future, sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated in damages and Plaintiffs are without an adequate remedy at law without the imposition of the requested equitable injunctive relief.

WHEREFORE Plaintiffs pray for judgment as follows:

1. That Defendants, and their officers, agents, servants, employees and attorneys and all persons in active concert with them, or any of them, be temporarily, preliminarily and permanently enjoined from further violating the Indian Gaming Regulatory Act of 1988, 25 U.S.C. 2701 et seq., the statutory Civil Rights Acts, 42 U.S.C. 1981, 1982, and 1985, the Jamul Constitution and ordinances, and the U.S. Constitution;

2. That Defendants, and their officers, agents, servants, employees and attorneys and all persons in active concert with them, or any of them, be temporarily, preliminarily and permanently enjoined from evicting the Plaintiffs from their homes;

3. That Defendants, and their officers, agents, servants, employees and attorneys and all persons in active concert with them, or any of them, be temporarily, preliminarily and permanently enjoined from interfering with, the Plaintiffs' use of their federal benefits;

4. That Defendants, and their officers, agents, servants, employees and attorneys and all persons in active concert with them, or any of them, be temporarily, preliminarily and permanently enjoined from interfering with the voting rights of the Plaintiffs;

5. That Defendants, and their officers, agents, servants, employees and attorneys and all persons in active concert with them, or any of them, be temporarily, preliminarily and permanently enjoined from violating the deed restrictions running in favor of the Plaintiffs' on parcels 597-080-01, and 597-080-02;

6. That the court declare that the Defendants may not provide consideration to those voting in federal elections at the Jamul Indian Village, contingent upon the infringement of the contract and property rights of those members and residents of JAMUL, who politically support the Plaintiffs' election to office at the Jamul Indian Village, and who support the Plaintiffs' prosecution of the above referenced IBIA appeals, and the actions before the Federal

Court of Claims and the San Diego Superior Court.

7. That Plaintiffs be awarded general damages subject to proof at trial;

8. That Plaintiffs be awarded punitive damages subject to proof at trial;

9. That Plaintiffs be awarded their reasonable attorneys' fees, costs, and expenses in this action; and

10. That Plaintiffs be awarded such other and further relief as this court may deem just and proper.

JURY DEMAND

Plaintiffs hereby demand trial by jury.

Dated: February 28, 2001

_____

WEBB & CAREY

_____

Patrick D. Webb, Attorneys for Plaintiffs
WALTER ROSALES, MARIE TOGGERY and
KAREN TOGGERY

Supreme Court, U.S.
FILED
SEP 18 2002
OFFICE OF THE CLERK

(2)

No. 02-280

In The Supreme Court of the United States

WALTER ROSALES; MARIE TOGGERY; KAREN TOGGERY,

Petitioners,

v.

KEAN ARGOVITZ RESORTS, INC., a limited liability company; LAKES GAMING, INC., a publicly traded company; KEAN-ARGOVITZ RESORT-JAMUL, LLC, a Nevada limited liability company; LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, a Delaware limited liability company,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION AND SUPPLEMENTAL APPENDIX

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QUESTIONS PRESENTED

1. Where a district court dismisses a second complaint on two alternative grounds: failure to plead a civil rights claim as required by the federal rules of civil procedure and, independently, failure to plead a claim as required by the court's earlier order, and the court of appeals affirms, is any civil rights issue properly before this Court?

2. Where a request to amend pleadings is not made by motion in the district court and is not raised as an issue in the Petitioners' opening brief in the court of appeals, does the issue survive to permit this Court to review it by certiorari?

CORPORATE DISCLOSURE STATEMENT

1. Lakes Gaming, Inc., is a publicly-traded company. No publicly-held companies own ten percent or more of its stock.

2. Kean Argovitz Resorts, Inc., has no parent corporations and no publicly-held companies own ten percent or more of its stock.

3. Kean Argovitz Resorts–Jamul, LLC, has no parent corporations and no publicly-held companies own ten percent or more of its stock.

4. Lakes Kean Argovitz Resorts–California, L.L.C., is owned by two parent corporations: Lakes Jamul, Inc., and Kean Argovitz Resorts–Jamul, L.L.C.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
BRIEF FOR THE RESPONDENTS IN OPPOSITION	1
OPINIONS BELOW	1
STATEMENT OF THE CASE	1
The Parties	2
The Claims	3
The Jamul Contract	3
The First Two Complaints and Their Dismissal	4
The Second Amended Complaint and Its Dismissal	6
The Fate of the State Law Tort Claims	8
Dismissal of the Federal Civil Rights Claims	9
The Ninth Circuit Appeal	10
REASONS THE WRIT SHOULD NOT BE GRANTED	11
I. THIS CASE DOES NOT PROVIDE A VEHICLE TO EXAMINE THE ISSUE PETITIONERS SEEK TO ARGUE	11
A. The Trial Court Decided the Case on Alternative Grounds	11
B. The Decision Does Not Decide the Issue Stated in the Petition for Certiorari	12

TABLE OF CONTENTS – Continued

Page

C. The Unpublished Opinion of the Lower Courts Does Not Contribute to Any Split in the Circuits 13

II. THE ISSUES RELATING TO AMENDMENT OF PLEADINGS HAVE BEEN WAIVED 14

CONCLUSION 15

SUPPLEMENTAL APPENDIX

Contents of Supplemental Appendix..... isa

Appendix A
(Memorandum Opinion and Order Regarding First Amended Complaint dated February 1, 2001)..... 1sa

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Addisu v. Fred Meyer, Inc., 198 F.3d 1130 (9th Cir. 2000) 12

DDI Seamless Cylinder International, Inc. v. General Fire Extinguisher Corp., 14 F.3d 1163 (7th Cir. 1994) 14

Griffin v. Breckenridge, 403 U.S. 88 (1971) 12, 13

Montana Pole & Treating Plant v. I.F. Laucks & Co., 993 F.2d 676 (9th Cir. 1993) 15

Welsh v. Derwinski, 14 F.3d 85 (1st Cir. 1994) 15

DOCKETED CASES

Jamul Indian Village v. Hunter, Case No. 95 CV 0131R (S.D. Cal.) 2

Rosales v. Townsend, Case No. 97-CV-0769 (S.D. Cal.) 2

Rosales v. United States, Case No. 98-860-L (S.D. Cal.) 2

FEDERAL STATUTES AND REGULATIONS

25 U.S.C. §§ 1981, 1982, and 1985(3) 12

42 U.S.C. § 1981 7

42 U.S.C. § 1982 7

42 U.S.C. § 1985(3) 2, 7, 12

Compact in May 2000. *Notice*, 65 Fed. Reg. 31,189 (May 16, 2000) 4

TABLE OF AUTHORITIES – Continued

Page

Fed. R. Civ. P. 12(b)(6) 11

Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721 (1994 & Supp. 1999) 5

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals Ninth Circuit is not reported and is designated as not for publication. The opinion of the United States District Court for the Southern District of California dated April 18, 2001, is also not reported. It is included in the Appendix at 3a. An earlier decision of the trial court dismissing the Petitioners' First Amended Complaint, dated February 1, 2001, is not reported and is included in the Supplemental Appendix at 1sa.

STATEMENT OF THE CASE

This case arises from contract negotiations between a gaming management contractor and a federally-recognized American Indian tribe. The tribe wishes to develop and operate a casino on tribal lands, and entered an agreement with the contractor to develop and manage the planned facility. The negotiations and resulting contract are subject to close regulation by the federal government. In fact, the contract is currently being reviewed by a federal agency, pursuant to congressionally-mandated regulations specifically intended to protect tribes. It will not take effect if the agency finds that the contractor acted improperly.

This case does not present the issue which Petitioners would have the Court reach. The district court dismissed Petitioners' Second Amended Complaint on two alternative grounds, only one of which presents Petitioners' issue concerning "conspiracy," and the Ninth Circuit affirmed

the dismissal on both bases. Neither court held that a private conspiracy is not an actionable claim under 42 U.S.C. § 1985(3); they simply held that the Petitioners had not stated such a claim.

The Parties

Petitioners are three tribe members who oppose gaming development. They attempted to assert civil rights claims against the Respondents, who contracted with the tribe to provide gaming management services. Petitioners cast this commercial dispute as civil rights claims, although they essentially allege only that the contractor acted improperly while negotiating the contract.

Petitioners live in or near the Jamul Indian Village and purport to be enrolled tribe members. ER at 75, ¶ 1.[1] They have been involved in a number of proceedings involving Jamul, having found themselves on the losing side of a number of intra-tribal disputes.[2] For instance, the Petitioners dispute the legitimacy of the current tribal leadership, asserting that Petitioner Rosales was elected Tribal Chairman in 1995, 1997, and 1999. There are currently proceedings pending before the Board of Indian

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[1] For convenience, citations to the Excerpt of Record filed in the Ninth Circuit are included as "ER at __" and to the Supplemental Excerpt of Record as "SER at __."

[2] At least two of the Rosales Claimants, represented by the same counsel, have filed the following federal cases involving Jamul's internal politics: *Jamul Indian Village v. Hunter*, Case No. 95 CV 0131R (S.D. Cal.); *Rosales v. Townsend*, Case No. 97-CV-0769 (S.D. Cal.); and *Rosales v. United States*, Case No. 98-860-L (S.D. Cal.). ER at 154.

Tribal Appeals that are expected to resolve this issue. Petitioners also disagree with Jamul's decision to develop a casino. They disapprove of gambling, considering it "a greed driven, predatory vice," and believe that the planned development will disrupt their homes. *Id.* at 5.

Respondents are related entities fairly described as "engaging in casino management," in the words of the trial court. App. at 14a, n.2. Respondent Lakes Kean Argovitz Resorts–California, L.L.C. ("Lakes KAR") contracted with Jamul Indian Village ("Jamul") to develop and manage a casino gambling facility on tribal land (the "Jamul Contract"). *See* SER at 59-107. The signatories on behalf of Jamul were the tribal Chairman, a Vice-Chairman, three members of the Executive Council, and the Secretary/Treasurer. SER at 105.

The Claims

Petitioners asserted novel claims in an attempt to involve the federal courts in an internal tribal dispute that does not implicate civil rights law, and that is currently being resolved in other forums, consistent with Congressional intent. Petitioners had three chances to serve and file a complaint that stated a civil rights claim, but they never did. They appealed the district court's dismissal of their third, insufficient effort.

The Jamul Contract

Intending to become involved in gaming to generate revenue for the tribe, the Jamul Indian Village ("Jamul")

entered into a Compact with the State of California in October 1999 (the "Compact"). SER at 108-68.[3] The Secretary of the Interior approved the Compact in May 2000. *Notice*, 65 Fed. Reg. 31,189 (May 16, 2000).

The core terms of the Jamul Contract are divided into "Development Provisions" and "Management Provisions," which involve, respectively, the development of a gaming facility and its subsequent operation. The Management Provisions will not take effect until approved by the National Indian Gaming Commission ("NIGC") Chairman. SER at 85. The Development Provisions allow Jamul to begin preparing for the development, while recognizing that the NIGC may not approve the Management Provisions. For example, pursuant to the Development Provisions, Lakes KAR is paying Jamul pre-construction advances of $40,000 per month pending approval. SER at 71. These advances are to be repaid pursuant to a Promissory Note agreed to by the parties. *Id.*

The First Two Complaints and Their Dismissal

In an attempt to stop gaming development, Petitioners filed this action against each of the Respondents, although only one of these entities, Lakes KAR, is a party to the Jamul Contract.

The underlying appeal challenged the dismissal of the Second Amended Complaint, which was filed in February

[3] The Compact was filed below as Exhibit A to the Notice of Lodgement and Request for Judicial Notice in Opposition to Defendants' Motion to Dismiss the First Amended Complaint. *See* ER at 7.

2001. That complaint represented Petitioners' third unsuccessful attempt to state a claim sufficient to survive a dismissal motion. The first Complaint was filed in September 2000. It named two corporate defendants (Respondents Kean Argovitz Resorts, Inc. and Lakes Gaming, Inc.), and two individual defendants. It asserted three state law tort claims and violations of three federal civil rights statutes, based on allegations that the defendants had purportedly violated the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721 (1994 & Supp. 1999) and the Compact during the Jamul Contract negotiations. SER at 5-16. It also sought declaratory and injunctive relief. *Id.* at 16-18.

The individual defendants sought dismissal on personal jurisdiction grounds, and the corporate defendants, joined by the individuals, filed a motion arguing that the action was preempted by IGRA, that Jamul was an indispensable party, and that the Complaint failed to assert facts sufficient to support the asserted civil rights claims. ER at 4. Before the district court could consider the dismissal motions, Petitioners rendered them moot by filing a First Amended Complaint. ER at 35-62. The First Amended Complaint dropped the two individual defendants and added two corporate defendants, resulting in the composition of parties involved in this appeal; it did not change the legal claims asserted in the First Amended Complaint.

Respondents moved to dismiss the First Amended Complaint on essentially the same grounds asserted against the initial Complaint, *i.e.*, that the action was preempted by IGRA, that the factual allegations did not support the alleged federal civil rights violations, and that

the entire action should be dismissed because Jamul was an indispensable party.

While electing not to dismiss the case on indispensable party grounds, the district court dismissed the state law tort claims as a matter of law, because they were based on alleged violations of IGRA and the Compact, neither of which afforded Petitioners a private right of action. Supp. App. at 4sa-8sa. The court also found that the state law tort claims were preempted by IGRA, because that statute vested authority in the NIGC – not in Petitioners – to oversee Indian gaming. *Id.* For these reasons, the court dismissed the state law tort claims with prejudice and without leave to amend. *Id.* at 14sa.

Having dismissed the state law tort claims, the district court concluded that it was "ill-equipped to properly examine" the federal civil rights claims, because they were based on factual allegations that supported the claims that had been dismissed. *Id.* The court therefore dismissed the federal civil rights claims without prejudice and with leave to amend. *Id.* Consistent with federal law, the court instructed the Petitioners that if they chose to assert federal civil rights claims in the future they "must plead ***specific facts*** regarding each Defendants' discriminatory conduct as to each individual Plaintiff." *Id.* at 13sa. (emphasis in original).

The Second Amended Complaint and Its Dismissal

Petitioners filed their Second Amended Complaint on February 28, 2001. Surprisingly, Petitioners included not only the federal civil rights claims the court had invited them to amend, but also the very same state law tort claims that had already been dismissed ***with prejudice***

and ***without leave*** to amend. *Id.* The factual allegations are substantially the same, except that almost every express reference to IGRA and the Compact was deleted, presumably to avoid the pitfalls of preemption that had defeated the claims in the First Amended Complaint.

The federal civil rights claims, which were the subject of the appeal to the Ninth Circuit were: an equal protection claim asserted under 42 U.S.C. § 1981, a property rights claim under 42 U.S.C. § 1982, and a claim of conspiracy to violate civil rights under 42 U.S.C. § 1985(3). The dismissal of the first two claims is not raised in the Petition for Certiorari.

In general, the Petitioners rested on broad, conclusory allegations. ¶¶ 22 & 34, App. at 28a, 34a. The Second Amended Complaint asserts that the conduct alleged in these paragraphs violates 25 U.S.C. §§ 1981, 1982, and 1985(3). *See* ¶¶ 60, 68 & 74, App. at 40a, 42a & 44a. Only the claim under section 1985(3) remains.

In addition, the twice-amended pleading asserts that "overt acts" in violation of these statutes "have been coupled with disparaging racial remarks concerning the Plaintiffs' respective degrees of Indian blood, including but not limited to referring to them as 'half blood Indians,' 'a half blood community,' and seeking to have them wrongfully evicted from their homes, and denied their possessory rights to their federal benefits." *Id.* The pleading does not allege, however, that any of the Respondents ever made any of the purportedly disparaging racial remarks. ¶¶ 20 & 33, *Id.* at 27-28a & 33-34a.

In addition, although the claim had been made earlier, the Second Amended Complaint does not contain allegations that the Respondents violated either IGRA or the

Compact. In fact, to avoid the district court's earlier conclusion that they can bring no private cause of action under IGRA or the Compact, the Petitioners simply deleted almost all such references from the Second Amended Complaint. They attempted to distance their case from Indian gaming, stating, "At its 'core' the Second Amended Complaint pleads seven causes of action that have nothing to do with the Defendants' attempts to build a casino in Jamul." ER at 155; *see generally id.* at 145-69.

The Fate of the State Law Tort Claims

Respondents moved to dismiss the Second Amended Complaint in its entirety. They argued, that the state law tort claims had already been dismissed with prejudice and without leave to amend. After receiving the motion and before the court could consider it, Petitioners withdrew the state law tort claims. App. at 11a. They then requested in their opposition papers, but never filed a motion for, leave to amend to re-assert the claims. *Id.*[4] Petitioners appear to ask this Court to review the amendment issue, although it was not properly raised in the district court nor preserved in the court of appeals. Pet. for Certiorari at 21 & n.9.

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[4] In the Rosales Claimants' other litigation involving Jamul, similar tactics caused the district court to issue an order to show cause why sanctions should not be imposed. ER at 134-36. After filing one action in the Southern District of California and facing a motion to dismiss, they voluntarily withdrew the case and filed an identical action in the Central District. *Id.* After the defendants filed a motion to dismiss the later-filed action, they again voluntarily dismissed the case. *Id.* The court ultimately declined to order sanctions, but issued a stern warning against such "procedural tactics and maneuvering." ER at 142.

In response, the district court noted that Petitioners' attempt to recast their case as one that was not integrally connected to Indian gaming was "not well taken." ER at 202. The court remarked that the deletion of references to IGRA and the Compact was "particularly surprising," since such violations had been alleged in both of their earlier complaints. *Id.* at 203. Recognizing that the state law tort claims were the same as those that had already been dismissed with prejudice and without leave to amend, and noting that Petitioners had already amended their complaint twice, the district court denied the motion to amend. *Id.* at 13a.

Dismissal of the Federal Civil Rights Claims

The motion to dismiss the federal civil rights claims was based primarily on two arguments, the second of which itself comprised two arguments: First, that the claims failed because they were preempted by IGRA, despite the deletion of almost all references to the statute; and, second, that the allegations did not meet the standard of specificity required by federal civil rights law or, alternatively, that the allegations did not comply with the district court's prior order. ER at 113. The district court agreed in all respects. App. at 13a.

In its memorandum, the district court reviewed the elements of each civil rights claim, as well as the pleading requirements, and concluded that to avoid dismissal Petitioners had to allege facts sufficient to support a "plausible inference of racially discriminatory intent." App. at 7a. The court concluded that Petitioners had not satisfied this standard because their allegations did "not support an inference of intentional racial discrimination,"

id. at 7a, and did not provide a causal link between Respondents' alleged acts and any intentional discrimination. *Id.* at 9a. As independent grounds for dismissal, the court found that Petitioners had failed to comply with the February 2001 Order that explicitly required them to "plead specific facts" if they sought to reassert their civil rights claims. App. at 10a-11a, quoting prior order, Supp. App. at 13sa. The court described the allegations as "at most, vague and ambiguous," and noted that they did not attribute racist remarks to any of the Respondents. App. at 10a.

The Ninth Circuit Appeal

On appeal to the Ninth Circuit, Petitioners challenged only the dismissal of the federal civil rights claims. By decision dated May 21, 2002, the court entered a unanimous Memorandum Decision. App. at 1a. The court designated its opinion as "not appropriate for publication" and held that it may not be cited as authority.

REASONS THE WRIT SHOULD NOT BE GRANTED

I. THIS CASE DOES NOT PROVIDE A VEHICLE TO EXAMINE THE ISSUE PETITIONERS SEEK TO ARGUE.

A. The Trial Court Decided the Case on Alternative Grounds.

The trial court dismissed the second amended complaint for two – or really, three[5] – separate reasons, only one of which would arguably relate to the issue Petitioners would have this Court reach.

First, the alternative bases for dismissal of the federal claims relate to how Petitioners pleaded, or failed to plead, their claims. The federal constitutional claims were dismissed for two interrelated reasons: They failed to state a claim and were dismissed under Fed. R. Civ. P. 12(b)(6) and they failed to state a claim under the requirements imposed by the trial court's earlier order.

When the district court dismissed the First Amended Complaint, it expressly allowed Petitioners to try yet again to state a claim. It dismissed the federal claims "without prejudice and with leave to amend." Supp. App. at 14sa. The court provided express guidance on what was necessary for any amended complaint:

> If Plaintiffs elect to file a Second Amended Complaint alleging civil rights violations under

[5] The state-law claims were dismissed on the grounds they are preempted by federal law. Supp. App. at 9sa-12sa. This issue was not apparently raised in the Petition, although in the conclusion Petitioners appear to seek to have them reinstated. Pet. at 21 & n.9.

> §§ 1981, 1982 and 1985, Plaintiffs must plead *specific facts* regarding each Defendants' discriminatory conduct as to each individual Plaintiff. Because Plaintiffs' proposed civil rights claims all independently arise from rights secured by the Constitution, Plaintiffs may not rely on or otherwise refer to IGRA or the Tribal-State Compact to establish the prima facie elements of their proposed civil rights claims.

Id. at 14sa (emphasis in original). The Second Amended Complaint was dismissed for its failure to state a claim under this requirement.

B. The Decision Does Not Decide the Issue Stated in the Petition for Certiorari.

Even if the district and circuit courts had decided this case solely on the basis of the third issue in I.A, there would still be no basis for this Court to reach the issue raised by Petitioner. The "conflict in the circuits" urged by Petitioners relates to whether a cause of action exists for conspiracy to deprive a citizen of the right to vote. Pet. for Certiorari at 9.

This Court has decided the only legal issue raised by the stated issue. In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Court articulated what is required to state a claim against a private conspiracy under 42 U.S.C. § 1985(3). The trial court here applied a standard consistent with that articulated in *Griffin*, citing the applicable Ninth Circuit precedent, App. at 7a, *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130 (9th Cir. 2000) (Aldisert, J.), which in turn cites and affirms the district court's application of *Griffin*.

The only thing actually decided here was that, despite being allowed repeated tries to plead a claim that complied with the requirements of *Griffin*, Petitioners never did so. As dictated by the facts – facts which the district court judge had repeated opportunity to come to know – the gravamen of Petitioners' complaints have always been a disagreement with casino gambling at the Jamul Indian Village. This economic dispute simply doesn't become an actionable civil rights complaint merely by adding talismanic conclusory language. Allegations that "statements were made," without alleging that it was the Respondents who made them, are similarly insufficient as a matter of fact. Although only notice of the claim is required under the rules, the trial court correctly determined that the complaint here did not state any basis to infer that any actions of anyone, let alone the Respondents, were motivated by any animus based on race or other class-status. App. at 7a.

Grounded only in the facts as pleaded by Petitioners in this case, and not the lofty legal issue Petitioners would have this Court address, the decisions here simply do not present any substantive issue, let alone one this Court needs to visit again, on the question stated in the Petition.

C. The Unpublished Opinion of the Lower Courts Does Not Contribute to Any Split in the Circuits.

Both the district court decision and the Ninth Circuit Memorandum affirming it are unpublished opinions, and the Ninth Circuit opinion is, by its terms and rule of court, not appropriate for citation to that court or any other courts. If any one-paragraph decision can contribute to a conflict in the circuits justifying the rare action of certiorari review by

this Court, certainly an unpublished one is unlikely ever to be important enough to warrant review. This decision is not.

II. THE ISSUES RELATING TO AMENDMENT OF PLEADINGS HAVE BEEN WAIVED.

Petitioners include in their Petition a request for review of a decision denying them leave to amend for a third time. Pet. at 21 & n.9. Any issue relating to amendment of their pleadings has been waived.

No motion to amend was filed in the district court. In fact, they expressly withdrew their state-court claims. App. at 11a. Then, only in a responsive brief, Respondents merely asked the district court for leave to amend to re-assert their state law tort claims, which had been dismissed. The federal civil rights claims were not part of this request. Indeed, the district court's express intent in inviting a second amended complaint was to permit Petitioners to re-plead their civil rights claims after the dismissal of the state law tort claims in the First Amended Complaint. Supp. App. at 13sa. There had been no developments since that amendment that would have justified a request for another amendment.

Moreover, Petitioners did not raise and brief the issue in the court of appeals; rather, in a footnote they merely claimed that they had asked the district court for leave to amend their federal civil rights claims. The district court decision to deny leave to amend refers only to state law claims. App. at 13a. Appellate courts regularly hold that failure to raise an issue and cite authority in the opening brief on appeal constitutes waiver of the issue. *See, e.g., DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher*

Corp., 14 F.3d 1163, 1168 (7th Cir. 1994) (argument stated in one sentence in the opening brief waived); *Welsh v. Derwinski*, 14 F.3d 85, 86 n.5 (1st Cir. 1994) (issues adverted to in a perfunctory manner and without developed argumentation are deemed waived on appeal). The Ninth Circuit did not err in applying this time-honored rule, especially where its own precedent dictates this result. *See, e.g., Montana Pole & Treating Plant v. I.F. Laucks & Co.*, 993 F.2d 676, 678 (9th Cir. 1993). This Court cannot provide the relief requested by Petitioners without addressing this issue. This case presents an anemic record upon which to consider any change in this aspect of appellate procedure, even if it were properly raised, and it was not raised properly here.

CONCLUSION

For the foregoing reasons, Respondents submit the writ of certiorari should not issue.

Respectfully submitted,

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CONTENTS OF SUPPLEMENTAL APPENDIX

Appendix A
(Memorandum Opinion and Order Regarding First Amended Complaint dated February 1, 2001) 1sa

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WALTER ROSALES, MARIE TOGGERY, and KAREN TOGGERY, Plaintiffs, v. KEAN ARGOVITZ RESORTS, LAKES GAMING, INC., KEAN-ARGOVITZ RESORTS-JAMUL, LC, LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LC, and DOES 1-20, Defendants	Case No. 00-CV-1910 W (POR) **MEMORANDUM OPINION AND ORDER REGARDING FIRST AMENDED COMPLAINT**

Before the Court is Defendants' motion to dismiss for failure to state a claim and failure to join an indispensable party under rules 12(b)(6) and 12(b)(7) of the Federal Rules of Civil Procedure. Plaintiffs Walter Rosales, Marie Toggery and Karen Toggery collectively oppose. All parties are represented by counsel. The Court decides the matter on the papers submitted and without oral argument pursuant to Civil Local Rule 7.1(d.1).

I. BACKGROUND

On October 17, 1988 Congress enacted the Indian Gaming Regulatory Act ("IGRA") which, among other things, allows federally recognized Native American tribes to establish casino gaming to promote tribal economic

development and self-sufficiency. *See* 25 U.S.C. §§ 2701 et seq. IGRA requires all Native American tribes intending to pursue Class III[1] casino gaming to negotiate a Tribal-State compact ("Compact") with the state in which the tribal lands are located. *See Id.* The Secretary of the United States Department of the Interior must also approve the Compact. *Id.*

The Jamul Indian Village ("Village"), a federally recognized Native American tribe, is seeking to establish Class III casino gaming on Jamul land. On October 8, 1999 the Village executed a Tribal-State compact with the State of California. On May 2, 2000 he Secretary of the Department of the Interior approved the Compact.

In February 2000, before the Compact was signed by the Secretary, the Village executed a management contract with Defendant Lakes Kean-Argovitz Resorts-California, LLC[2], to manage Village gaming operations. (*See Defs.' Mem. of P. & A.* at 2.) The National Indian Gaming Commission ("NIGC") is currently reviewing the contract for final approval. (*See Id.*) Absent such approval, the project cannot go forward. (*See Id.*)

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[1] Class III gaming is defined as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. §2703(8). Generally, Class I gaming is typically identified as social games solely for prizes of minimal value. *See* 25 U.S.C. §2703(6). Class II gaming usually means the game of chance commonly known as bingo. *See* 25 U.S.C. §2703(7)(A).

[2] For purposes of this motion only, the Court will collectively refer to defendants Kean-Argovitz Resorts, Lake Gaming, Inc., Kean-Argovitz Resorts-Jamul, LLC, and Lakes Kean-Argovitz Resorts-California, LLC as "Defendants." The Defendants primarily engage in casino management.

Plaintiffs Walter Rosales, Marie Toggery and Karen Toggery ("Plaintiffs") are Village members and residents. Plaintiffs' First Amended Complaint ("FAC") alleges seven claims for relief based on Defendants' association and contracts with the Village. Specifically, Plaintiffs allege: (1) interference with contractual and economic advantage; (2) fraud; (3) negligent misrepresentation; (4-6) civil rights violations per 42 U.S.C. §§ 1981, 1982 and 1985; and (7) seek declaratory relief. On December 19, 2000 Defendants responded with a motion to dismiss for failure to state a claim and failure to join an indispensable party.

II. LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the sufficiency of the complaint. *See North Star Int'l v. Arizona Corp. Comm'n,* 720 F.2d 578, 581 (9th Cir.) 1983). Dismissal of a claim under this Rule is appropriate only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1482 (9th Cir. 1991) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)).

Under Rule 12(b)(6), a court may dismiss a complaint in three instances. First, dismissal is warranted where the complaint lacks a cognizable legal theory. *See Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984); *Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S.Ct. 1827, 1832, 104 L.Ed.2d 338 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law."). Second, a complaint may be dismissed where it presents a cognizable legal theory yet fails to

plead essential facts under that theory. *See Robertson*, 749 F.2d at 533. Third, dismissal is appropriate where the complaint pleads facts that affirmatively establish that the plaintiff has no legal claim. *See, e.g., Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997); *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 723 (7th Cir. 1986) (Posner, C.J.) ("A plaintiff who files a long and detailed complaint may plead himself out of court by including factual allegations which if true show that his legal rights were not invaded.").

In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the court must assume the truth of all factual allegations and must construe them in the light most favorable to the nonmoving party. *See North Star*, 720 F.2d at 580. However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. *See Western Mining Council v. Watt*,643 F.2d 618, 624 (9th Cir. 1981); *see also In re Verifone Sec. Litig.*, 11 F.3d 865, 868 (9th Cir. 1993).

III. DISCUSSION

Defendants move to dismiss Plaintiffs' action on three grounds. First, Defendants assert that IGRA and the Village/State of California Compact do not provide Plaintiffs with a private right of action. Second, Defendants content that IGRA preempts Plaintiffs' claims. Finally, Defendants argue this action must be dismissed under Rule 19(b) of the Federal Rules of Civil Procedure for lack of an indispensable party, the Jamul Indian Village. The Court will discuss each of Defendants' arguments in turn.

A. THERE IS NO PRIVATE RIGHT OF ACTION UNDER IGRA AND THE TRIBAL-STATE COMPACT

As an initial matter, Defendants contend IGRA and the Compact do not provide Plaintiffs with a private right of action such that claims arising thereunder are barred as a matter of law. (*See Defs.' Reply* at 3-4.) The Court agrees.

1. INDIAN GAMING REGULATORY ACT.

In 1988, Congress passed IGRA to: (1) statutorily regulate Indian gaming; (2) create federal standards for gaming on Indian land; and (3) establish an independent federal regulatory authority thereon. *See* 25 U.S.C. §2702. IGRA also established the National Indian Gaming Commission ("NIGC") to oversee regulation, licensing and other facets of Indian gaming. *See generally* 25 U.S.C. § 2704-20. The NIGC can approve or disapprove license applications, management contracts and tribal gaming ordinances. *See Id.* Additionally, the NIGC has a broad grant of regulatory authority. *See Id.*

The Supreme Court had held that in the face of such a comprehensive regulatory scheme, courts should not imply private rights of action. *See National R.R. Passenger Corp. v. National Assoc. of R.R. Passengers*, 414 U.S. 453, 458 (1974). "[W]hen legislation expressly provides a particular remedy or remedies, court should not expand the coverage of the statute to subsume other remedies." *Id.*; *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) ("[W]hen Congress wished to provide a private . . . remedy, it knew how to do so and did so expressly.).

Indeed, IGRA has explicitly provided for limited and narrow private rights of action. *See Hein v. Capitan Grande Band of Diegueno Mission*, 201 F.3d 1256, 1260

(9th Cir. 2000) (holding that IGRA provides no general private right of action). For example, IGRA specifically permits Indian tribes to file suits seeking to compel NIGC management contract approval. *See* 25 U.S.C. § 2711(d). In addition, § 2714 extensively provides that "[d]ecisions made by the Commission pursuant to sections 2710 ["Tribal gaming ordinances"], 2711 ["Management contracts'], 2712 ["Review of existing ordinances and contracts"], and 2713 ["Civil penalties"] of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court." 25 U.S.C. § 2714.

In this case, Plaintiffs bring suit under various theories arising under state and federal law. However, Plaintiffs candidly admit that their claims arise from "Defendants' violation of IGRA and the Jamul Tribal-State Compact." (*Pls.' Opp'n* at 4 n.1.) Plaintiffs argue throughout their FAC that Defendants are "continuously violating . . . the Indian gaming Regulatory Act."[3] (*FAC* at ¶ 40-43, 53-56.) In *Hein*, the Ninth Circuit faced very similar circumstances. In dismissing claims related to IGRA, the Ninth Circuit stated:

> [W]here IGRA creates a private cause of action, it does so explicitly. For example, it specifically provides for suit by an Indian tribe to compel action by the Commission to approve or disapprove management contracts, 25 U.S.C. § 2711(d), and also explicitly allows for tribes to sue states under some circumstances. 25 U.S.C. § 2710(d). The existence of such explicit provisions authorizing

[3] Plaintiffs also incorporate these allegations into their state and federal claims. (*See FAC* at ¶ 49, 62, 72, 80, 88, 95, 103.)

> suits persuaded the Eleventh Circuit that plaintiffs could not sue for every violation of IGRA by direct action under the statute. *Tamiami Partner v. Miccosukee Tribe of Indians of Florida*, 63 F.2d 1030, 1049 (11th Cir. 1995). We agree with the Eleventh Circuit's conclusion.

Hein, 201 F.2d at 1260.

Based upon IGRA's enumerated rights of action and the Ninth Circuit's reasoning in *Hein*, this Court concludes that IGRA provides no private cause of action for violation of its general provisions[4]. *See Hein* 201 F.2d at 1260. Plaintiffs cannot make an end run around IGRA's provisions by disguising their claims as violations of state and federal law. If federal courts were permitted to adjudicate any alleged IGRA violation, courts would improperly infringe upon NIGC authority – the entity Congress expressly authorized to enforce IGRA's terms. *See* 25 U.S.C. § 2701 et seq. Accordingly, this Court declines Plaintiffs' invitation to read into IGRA the private rights of action Plaintiffs assert in their FAC. The Court dismisses Plaintiffs' claims to the extent they rely on IGRA. Plaintiffs' claims, as alleged, do not fall under IGRA's private right of action provisions.

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[4] Furthermore, the Supreme Court observed that, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co.*, 442 U.S. 560, 568 (citation omitted).

2. TRIBAL-STATE COMPACT

To the extent Plaintiffs' claims are based on the Compact, these claims are likewise dismissed because the Compact does not create a private right of action for alleged violations thereof.

IGRA requires all Native American tribes pursuing Class III casino gaming to execute a Tribal-State compact ("Compact") with the state in which the tribal lands are located. *See* 25 U.S.C. § 2710(d)(3)(A). The Secretary of the Department of the Interior must approve the Compact. *See* 25 U.S.C. § 2710(d)(3)(B). On October 8, 1999 the Village negotiated a Tribal-State compact with the State of California. On May 5, 2000 the Secretary of the Department of the Interior approved the Compact.

Among the Compact's many provisions, Section 15.1 provides "[e]xcept to the extent expressly provided under this Gaming Compact, this Gaming Compact is not intended to, and shall not be construed to, create any right on the part of a third party to bring an action to enforce any of its terms." (*Pls.' Notice of Lodgement and Req. for Judicial Notice*, Ex. A at 37.) The aforementioned language is clear on its face. Any private right of action brought under the Compact must be authorized by the Compact itself.

In this case, Plaintiffs allege Defendants violated a variety of state and federal law by breaching various provisions of the Compact. (*See* FAC at ¶ 40-43, 49, 53-56, 62, 72, 80, 88, 95, 103.) However, Plaintiffs do not identify nor does the Court find any express Compact provisions

which allow Plaintiffs to privately sue Defendants to enforce the Compact's terms[5]. Accordingly, the Court dismisses Plaintiffs' claims to the extent they rely on purported violations of the Compact.

B. PREEMPTION OF PLAINTIFFS' STATE LAW CLAIMS

Even assuming Plaintiffs could pursue a private right of action, Defendants contend IGRA preempts Plaintiffs' state law claims. *See Defs.' Mem. of P. & A.* at 11-13.) Plaintiffs counter that "IGRA explicitly does not create an exclusive federal scheme for the regulation of Indian gaming." (*Pls.' Opp'n* at 17.)

1. IGRA'S FEDERAL PREEMPTION OF STATE LAW

Generally, preemption applies in Indian law where the application of state law "interferes or is incompatible with federal or tribal interests as reflected in federal law." *See Confederated Tribes of Siletz Indians of Oregon v. State of Oregon*, 143 F.3d 481, 487 (9th Cir. 1998) (quoting *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994). "No specific congressional intent to preempt state activity is required; it is enough that the state law conflicts with the purpose or operation of a federal

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[5] The Court agrees with Defendants' assertion that Plaintiffs' reliance on the Compact is "odd[] at best." (*See Defs.' Reply* at 4 n.2.) Plaintiffs take the position that the Compact is not final because of a pending tribal leadership dispute. (*See Pls.' Opp'n* at 6-7.) Ironically, Plaintiffs simultaneously argue that the disputed conduct in this case violates the same Compact. (*See Id.*) Plaintiffs cannot have it both ways. If the Compact is not final, it has no legal effect, and by extension, no impact on this case.

statute, regulation, or policy." *Cabazon*, 37 F.3d at 433 (citation and internal quotations omitted).

Congress enacted IGRA to provide statutory oversight and regulation of Indian gaming. *See* 25 U.S.C. § 2702(1-2) (emphasis supplied). Congress passed IGRA in order to: (1) establish an independent federal regulatory authority to oversee Indian gaming; (2) create federal standards for regulations thereon; and (3) form the NIGC to protect gaming as a tribal revenue source. *See* 25 U.S.C. § 2702(3). "The legislative history makes clear the purpose and effect of the statute: to protect the Indian gaming industry from corruption and to provide for extensive federal oversight of all but the most rudimentary forms of Indian gaming." *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1033 (11th Cir. 1995) (footnote omitted). As further evidence of this purpose, the Senate Report submitted with the statute at the time of its passage unequivocally states that IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands." *Id.* (citing S.Rep. No. 446, 100th Cong., 2d Sess. 15-16 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076).

Despite clear Congressional intent that federal law occupy the field of Indian gaming, Plaintiffs herein seek to assert several claims arising under state law. All of these claims relate to Defendants' negotiation of a casino management contract with the Village. Specifically, Plaintiffs allege that Defendants have been: (1) knowingly and willfully providing materially false statements or information to Village members; (2) unduly interfering and influencing Class III gaming tribal government decisions; (3) significantly and unduly influencing the adoption of a Class III gaming ordinances, through persons whose prior activities and associations threaten the public interest;

and (4) unlawfully contributing money and other valuable consideration to Village members and non-members to influence their vote in favor of a Jamul Class III gaming ordinance. (*See FAC* at 10-11.)

The Court finds that all of Plaintiffs' state law claims are preempted by IGRA. Recognition of Plaintiffs' state law claims would wrongfully interfere with Congressional intent to statutorily regulate Indian gaming. *See* 25 U.S.C. § 2702(1-2). Ironically, Plaintiffs' "state law" allegations directly quote Congressional findings codified at 25 U.S.C. § 2711(e)[6]. However, § 2711(e) exclusive assigned the NIGC Chairman, not Plaintiffs, the authority to oversee Indian casino management contract disputes. *See* 25 U.S.C. § 2711(e).

Congressional desire to establish a uniform body of federal Indian gaming law is well founded. Hundreds of tribes are organized and reside in the United States. Obviously, state law varies from jurisdiction to jurisdiction. Rather than apply an unpredictable patchwork of state law to various Indian casino management contracts, Congress implemented IGRA to establish a uniform federal body of Indian gaming law. This Court will not

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[6] Section 2711(e) provides that the Chairman of the NIGC *shall not approve* a management contract if the Chairman determines that: (1) any person "has knowingly and willfully provided materially important false statements or information . . . to the Indian tribe;" (2) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associates pose a threat to the public interest . . . thereto; and (3) "the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relation to the gaming activity." 25 U.S.C. § 2711(e)(1)(C)-(D), (e)(2) (emphasis supplied).

usurp powers expressly bestowed upon the NIGC Chairman by Congress. Accordingly, Plaintiffs' state law claims are preempted since they conflict with IGRA's express purpose, regulation, oversight and implementation[7]. *See Cabazon Band*, 37 F.3d at 433 (holding that state law is preempted if it conflicts with the purpose or operation of a federal statute, regulation, or policy).

2. THE COMPACT DOES NOT REQUIRE THE APPLICATION OF CALIFORNIA LAW TO PLAINTIFFS' CLAIMS

Plaintiffs further argue the Compact requires application of California law to their claims for tortious interference, fraud, and negligent misrepresentation[8]. (*See Pls.' Opp'n* at 17-18.) The Court disagrees.

"[U]nless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not uni[l]aterally impose or allow State jurisdiction on Indian lands for the regulation of Indian

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[7] Additionally, it is well-settled that management contracts between Native American tribes and casino management companies are vital to Indian gaming. Indeed, it would be difficult for Indian tribes and casino management companies to enter into management contracts if any individual tribal member could bring suit in federal court to challenge the contract based on one party's negotiation tactics. Without these contracts, gaming operations would never exist on tribal lands, thus impeding Congressional intent of "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

[8] Once again, Plaintiffs rely on the Tribal-State compact when they contend the same Compact is not final because of a pending tribal leadership dispute.

gaming activities." S.Rep. No. 466, 100th Cong., 2d Sess. 5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075. "Congress ... left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact." *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996) ("Under IGRA, state law may not be applied to regulate the tribal licensing process, even if indirectly, unless a tribal-state compact so provides.").

Here, Plaintiffs admit state law will apply where "specified in the [C]ompact." (*Pls.' Opp'n* at 17.) Plaintiffs further argue the Compact provides for "the application of California's civil remedies for tortious interference, fraud, and negligent misrepresentation." (*Id.*) However, Plaintiffs fail to identify any language contained in the Compact which supports such a position. This Court has likewise reviewed the Compact and cannot locate any contract language supporting Plaintiff's sweeping interpretation. While Plaintiffs do generally cite eighteen Compact provisions – none impose civil remedies upon the parties' gaming contract negotiations. Accordingly, the Court concludes that the California law upon which Plaintiffs' rely is not implicated or otherwise supported by the Compact's language. The Court **DISMISSES** Plaintiff's state law claims with prejudice and without leave to amend.[9]

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[9] That is not to say, however, that Plaintiffs are completely barred from raising claims under California law. For example, if Plaintiffs can properly allege claims that rely on California law specifically enumerated

(Continued on following page)

C. PLAINTIFFS' FEDERAL CIVIL RIGHTS CLAIMS

Plaintiffs' only remaining claims are those brought under 42 U.S.C. §§ 1981, 1982 and 1985. Each of these claims exclusively rely on the factual allegations which supported Plaintiffs' now dismissed state law claims. Because those claims have been dismissed, the Court is ill-equipped to properly examine the merits of Plaintiff's remaining federal claims. Accordingly, the Court **DISMISSES** Plaintiffs' federal claims without prejudice and with leave to amend.

If Plaintiffs elect to file a Second Amended Complaint alleging civil rights violations under §§ 1981, 1982 and 1985, Plaintiffs must plead *specific facts* regarding each Defendants' discriminatory conduct as to each individual Plaintiff. Because Plaintiffs' proposed civil rights claims all independently arise from rights secured by the Constitution, Plaintiffs may not rely on or otherwise refer to IGRA or the Tribal-State Compact to establish the prima facie elements of their proposed civil rights claims.

The Court need not reach the parties' remaining arguments insofar as all claims have now been dismissed. To the extent Defendants contend the Jamul Indian Village is a necessary and indispensable party under Rule 19(b), the Court respectfully disagrees. This action may proceed without the Village as a named party.

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and/or identified in the Compact – such claims may be capable of relief. The Court need not reach those issue insofar as they were not presented to the Court.

IV. CONCLUSION AND ORDER

In light of the foregoing, the Court **GRANTS** Defendants' Rule 12(b)(6) motion to dismiss (Doc. Nos. 35-1) and **DENIES** Defendants' Rule 12(b)(7) motion to dismiss (Doc. No. 35-2). The Court **DISMISSES** Plaintiffs' state law claims with prejudice and without leave to amend. The Court **DISMISSES** Plaintiffs' federal claims without prejudice and with leave to amend. Plaintiffs' Second Amended Complaint must be filed and served no later than ***February 28, 2001.***

The Court additionally **DENIES** as moot, and without prejudice, non-party Bureau of Indian Affairs and National Indian Gaming Commission's motion to quash subpoenas. (Doc. No. 30-1.)

IT IS SO ORDERED.

DATE: February 1, 2001

/s/ Hon. THOMAS J. WHELAN
United States District Court
Southern District of California

CC: HON. LOUISA S. PORTER, UNITED STATES MAGISTRATE JUDGE ALL PARTIES AND COUNSEL OF RECORD

(3)

Supreme Court, U.S.
FILED

OCT 9 2002

OFFICE OF THE CLERK

No. 02-280

In the

Supreme Court of the United States

WALTER ROSALES; MARIE TOGGERY;
KAREN TOGGERY,

Petitioners,

v.

KEAN ARGOVITZ RESORTS, INC., a limited liability company; LAKES GAMING, INC., a publicly traded company; KEAN-ARGOVITZ RESORT-JAMUL, LLC, a Nevada limited liability company; LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, a Delaware limited liability company,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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14 pp

TABLE OF CONTENTS

I. THE TRIAL COURT'S ALTERNATIVE GROUNDS FOR DISMISSING THE SECOND AMENDED COMPLAINT, STILL CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL, AND FAIL TO ADDRESS PETITIONERS' CLAIMS UNDER 42 U.S.C. 1985(3). 1

II. UNPUBLISHED CIRCUIT COURT DECISIONS DO CREATE CONFLICTS WITH OTHER PUBLISHED CIRCUIT COURT DECISIONS 2

III. PETITIONERS PLEAD SPECIFIC FACTS CONSTITUTING A PRIVATE CONSPIRACY TO BY NON-INDIAN GAMING CORPORATIONS TO DEPRIVE PETITIONERS OF THE RIGHT TO VOTE BECAUSE PETITIONERS ARE INDIANS AND MEMBERS OF A TRIBAL POLITICAL FACTION 3

IV. CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Beanal v. Freeport-McMoran, Inc.
(5th Cir. 1999) 197 F.3d 161 8

Bennett v. Schmidt
(7th Cir. 1998) 153 F.3d 516 7

Cameron v. Brock,
(6th Cir. 1973) 473 F.2d 608 ..... *2*

Conley v. Gibson
(1957) 355 U.S. 41 8

Estate of Floyd Cowart v. Nicklos Drilling Co.
(1992) 505 U.S. 469 2

Evans v. McKay
(9th Cir. 1989) 869 F.2d 1341 ..... 4, 5

Gilligan v. Jamco Develop. Corp.
(9th Cir. 1997) 108 F.3d 246 8

Glasson v. City of Louisville,
(6th Cir. 1975) 518 F.2d 899 ..... *2*

Griffin v. Breckenridge
(1971) 403 U.S. 88 ..... *3*

Hampton v. Hanrahan,
(7th Cir. 1979) 600 F.2d 600 ..... *2*

Jenkins v. McKeithen
(1969) 395 U.S. 411 8

Keating v. Carey,
(2nd Cir. 1983) 706 F.2d 377 2

King v. State of California
(9th cir. 1986) 784 F.2d 910 5

Lewis v. ACB Business Services, Inc.
(6th Cir. 1998) 135 F.3d 389 8

MacDissi v. Valmont Indus.,
(8th cir. 1988) 856 F.2d 1054 ..... *4*

Malhotra v. Cotter & Co.,
(7th Cir. 1989) 885 F.2d 1305 4

Means v. Wilson
(8th Cir. 1975) 522 F.2d 833 1,2,6

Michelman v. Kingswood
(1974) 418 U.S. 902..... 2

Saint Francis College v. Al Khazraji,
(1987) 481 U.S. 604 ..... *4*

Shaare Tefila Congregation v. Cobb,
(1987) 481 U.S. 615 ..... *4*

Sparrow v. United Air Lines, Inc.
(DC Cir. 2000) 216 F.3d 1111 7

Stevens v. Rifkin,
(N.D. Cal. 1984) 608 F. Supp. 710 2

Thompson v. New York,
(N.D.N.Y. 1979) 487 F. Supp. 212 ..... *2*

Other Authorities

42 U.S.C. 1985(3) ..... in passim

F.R.C.P. Rule 8 7

F.R.C.P. Rule 8(a) 8

F.R.C.P. Rule 8(e)(1) 7

I. THE TRIAL COURT'S ALTERNATIVE GROUNDS FOR DISMISSING THE SECOND AMENDED COMPLAINT, STILL CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL, AND FAIL TO ADDRESS PETITIONERS' CLAIMS UNDER 42 U.S.C. 1985(3).

Contrary to the Respondents unsupported assertion, the lower courts did not independently address Petitioners' 42 U.S.C. 1985(3) claims in the Sixth Claim for Relief of the Second Amended Complaint. AA 44a-45a. The lower courts particularly failed to address the independent allegations of the Respondents' private conspiracy to deprive Indian members of a tribal political faction of their undiluted right to vote in federal tribal elections.

Instead, Petitioners' claims under 42 U.S.C. 1985(3) are addressed in footnote 3 of the District Court ruling, AA 8a, and 14a, wherein District Judge Whalen states: "Plaintiffs cite *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975) as controlling Ninth Circuit authority to support their § 1985(3) claim. (See Pls.' Opp'n at 12-14.) However, upon further examination by the Court, Means was decided by an Eighth Circuit panel. The Court is not bound or persuaded by Means and declines to follow its reasoning here." AA 14a. Similarly, the Ninth Circuit merely adopted the District Court's opinion, stating: "for the reasons stated by the district court, we agree that the plaintiffs failed to state a claim upon which relief could be granted." AA 2a.

Contrary to the Respondents' implication, none of Petitioners' other claims for relief in the Second Amended Complaint, AA 21a-48a, are at issue in the petition for certiorari before this Court. In addition, it is clear from the lower courts' ruling, that both courts specifically refused to

follow the Eighth Circuit's opinion in *Means v. Wilson*, *supra*, and refused to find that a private conspiracy to deprive Indian members of a tribal political faction of their right to vote stated a cause of action under 42 U.S.C. 1985(3), which is still in conflict with the decisions of other courts of appeals and district courts, See for e.g., *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975) *cert. denied*, 424 U.S. 958 (1976); *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *mod. on other grounds*, 446 U.S. 754 (1980); *Thompson v. New York*, 487 F. Supp. 212 (N.D.N.Y. 1979); *see also*, *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975); *Keating v. Carey*, 706 F.2d 377 (2nd Cir. 1983); and *Stevens v. Rifkin*, 608 F. Supp. 710 (N.D. Cal. 1984).

II. UNPUBLISHED CIRCUIT COURT DECISIONS DO CREATE CONFLICTS WITH OTHER PUBLISHED CIRCUIT COURT DECISIONS

Contrary to the Respondents' unsupported assertion, even an unpublished decision of the Ninth Circuit dismissing § 1985(3) claims, still creates a conflict with other published circuit court opinions that refused to dismiss similar claims. See for e.g., the conflict among unpublished circuit court decisions noted by this Court in *Estate of Floyd Cowart v. Nicklos Drilling Co.* (1992) 505 U.S. 469,474, and *Michelman v. Kingswood* (1974) 418 U.S. 902, vacating and remanding an unpublished decision of the Ninth Circuit on petition for certiorari.

The refusal to publish a decision in conflict with other published circuit court opinions is certainly no less a conflict, and may well be of more significance, since it not only denies the Petitioners in this case, but deprives all of the citizens of the Ninth Circuit of a published precedent following the Second, Sixth, Seventh, and Eighth Circuits,

thereby depriving the citizens of the Ninth Circuit of an equal right to prosecute claims against private conspiracies based upon class-based animus that deprive them of the right to vote, recognized in the Second, Sixth, Seventh, and Eighth Circuits.

It is also clear that the lower courts' rulings in this case conflict with the other circuits that recognize that a private conspiracy to discriminate based upon membership in a racial and political class remains actionable under 42 U.S.C. 1985(3), as expressed by this Court in *Griffin v. Breckenridge* 403 U.S. 88 (1971) ("*Griffin*"). For example, the District Court recognized that "these allegations support a finding that Respondents' acts of contributing money were prompted by their political views." AA 8a.

III. PETITIONERS PLEAD SPECIFIC FACTS CONSTITUTING A PRIVATE CONSPIRACY TO BY NON-INDIAN GAMING CORPORATIONS TO DEPRIVE PETITIONERS OF THE RIGHT TO VOTE BECAUSE PETITIONERS ARE INDIANS AND MEMBERS OF A TRIBAL POLITICAL FACTION.

Petitioners' Sixth Claim for Relief in the Second Amended Complaint did specifically allege that Respondents conspired and did overt acts in furtherance of a conspiracy to deprive the Petitioners of their right to vote, because they are Indian, and the Respondents are not, even though the District Court erroneously concluded that the Second Amended Complaint did not sufficiently allege that the Respondents' acts were motivated by racial discrimination, AA 8a. "[Respondents] did the overt acts alleged herein, and...conspiring to deprive [Petitioners] of their...right to

vote, due to their, ...ancestry..." AA 44a, para. 74.

"[Respondents'] overt acts violating ...42 U.S.C. 1985(3), have been coupled with disparaging racial remarks concerning the [Petitioners'] respective degrees of Indian blood, including but not limited to referring to them as "half blood Indians", "a half blood community," and seeking to have them wrongfully evicted from their homes, and denied their possessory rights in their federal benefits." AA 8a, para. 75.

There can be no question that Petitioners have alleged that the Respondents' discrimination is motivated by "racial animus," since it is the Petitioners' very racial ancestry that entitles them to their property and contract rights, from which the Respondents seek to remove them, in addition to the allegations of "disparaging remarks about race." Just as in *Evans v. McKay* (9th Cir. 1989) 869 F.2d 1341, 1344, (even though a §1982 case), the "racial remarks" here, are merely further evidence that the Respondents' overt acts of discrimination were "coupled" with an illegal racial motivation.

Respondents' also totally ignore the fact that allegations of intentional discrimination "due to ancestry," has long been held to satisfy the specific pleading requirements for civil rights violations. *Saint Francis College v. Al Khazraji*, 481 U.S. 604, 613, (1987) (holding that plaintiff could maintain an action under section 1981 for racial discrimination based on plaintiff's status as an Arab). See also, *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18, (1987) (individual may maintain section 1981 claim based on individual's status as a Jewish person); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir.1989) (section 1981 redresses intentional discrimination because of Indian ancestry); *MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir.1988) (plaintiff stated viable section 1981 claim by alleging intentional discrimination

based on Lebanese descent).

Similarly, here, the Petitioners have plead overt acts coupled with direct evidence that the Petitioners' conduct was motivated by racial, ancestral animus against those of "one-half degree or more Indian blood." AA 28a, para. 22. Respondents' assertion that Petitioners failed to plead sufficient facts to constitute "racial" discrimination is simply wrong. The Petitioners specifically alleged that the infringement of both their contract and property rights was perpetrated "due to their ancestry." AA 28a, para. 22. That such infringement was purposefully directed at their race is further evident from the fact that the Respondents only discriminated against those of "one-half degree or more Indian blood," who are entitled by virtue of their "race" to the land held in trust by the United States, upon which the Respondents seek to build a casino. AA 23a-24a, para. 7.

Here, the corporate Respondents do not deny that they are operated by non-half-blood Jamul Indians. Nor do they deny that they are alleged to have committed overt acts of racial and ancestral animus toward the half-blood Jamul Indian Petitioners, by paying others to deprive them of their homes and utility contracts. Nor do they deny that the corporate Respondents are alleged to have spent hundreds of thousands of dollars to influence Mexican immigrants and other non-members of the Village, who are not of "one-half degree Indian blood," to vote in favor of evicting the Petitioners from their homes, because the Petitioners are of "one-half degree or more Indian blood."

Such private discrimination clearly falls within the prohibition of unequal treatment, and "shows intentional discrimination on account of race." *Evans v. McKay* (9th Cir. 1989) 869 F.2d 1341, 1344. Just as in *Evans*, the individual corporate Respondents are alleged to have paid non-defendants to discriminate against the Petitioners in an effort "to drive plaintiffs out of business, run them off the

[property], and violate their civil rights."Id., 1344.

It was erroneous for the District Court to find Petitioners' Sixth Claim for Relief "conclusory," where they specifically allege that the Petitioners were deprived of the right to vote because they are Indian, and members of the tribe that politically oppose building a casino, where their homes now stand. Unlike in *King v. State of California* (9th cir. 1986) 784 F.2d 910, 916, cited by the District Court, AA 10a, the Petitioners, here, did not "fail to allege discrimination at all." Nor are Petitioners' claims here conclusory, any more than the claims in *Means v. Wilson* (9th Cir. 1975) 522 F.2d 833, which were found not to be conclusory, since they specifically alleged "defendants conspired and did overt acts in furtherance of a conspiracy to deprive the plaintiffs of their right to vote [in federal tribal elections] because they were supporters of plaintiff." *Means* at 839.

Respondents and the lower courts erroneously ignore the fact that the Petitioners have plead specific facts regarding each Respondent's discriminatory conduct as to each individual Petitioner, in violation of 42 U.S.C. 1985(3).

All four individual corporate Respondents are alleged to have discriminated against all three of the individual Petitioners as follows:

(1) paying money and other valuable consideration reported to be in excess of $100,000 per month to the Plaintiff-Appellants' political opponents contingent upon those individuals depriving the Plaintiff-Appellants of their homes, the benefits of their utility services, and the quiet enjoyment of their usufructuary property rights in their federal benefits and Village assets, including interfering with 30 of the Petitioners' contracts. AA 27a, and 29a-32a.

(2) paying money and other valuable consideration reported to be in excess of $100,000 per month to the

Plaintiff-Appellants' political opponents, to verbally threaten the Plaintiff-Appellants and their children with physical harm, to use racially derogatory and ancestral slurs against the Plaintiff-Appellants to harass and intimidate them, to throw rocks at the windows of Plaintiff-Appellants' houses and vehicles, and to have burned down one of the Plaintiff-Appellants' trailers and set a truck on fire adjacent to another Plaintiff-Appellant's house; AA 26a-27a.

(3) paying money and other valuable consideration reported to be in excess of $100,000 per month to non-members of the Jamul Indian Village with which they have been bribed to attend meetings, in order to vote to bulldoze the Plaintiff-Appellants' homes, and deny Plaintiff-Appellants the equal enforcement of their utility service contracts and usufructuary property rights in their federal benefits and assets of the Village; AA 28a.

(4) paying money and other valuable consideration reported to be in excess of $100,000 per month to the Jamul Indian Village electorate to dilute the vote of the Plaintiff-Appellants with regard to their use and enjoyment of their homes, utility contracts, and usufructuary property rights in their federal benefits and assets of the Village; AA 28a.

Therefore, the Petitioners did not violate the trial court's February 1, 2001 order regarding specificity. SA 14sa. The Petitioners have plead *"specific facts"* regarding each Respondent's discriminatory conduct as to each individual Petitioner. SA 14sa.

F.R.C.P., Rule 8 sets forth the basic rules concerning "specificity" for pleading in federal court. The fundamental requirement imposed by Rule 8 is that all claims or defenses alleged in a pleading shall be set forth in short and plain terms and shall be simple, concise and direct. No technical forms of pleadings are required. In fact, the federal rules require that all allegations be "short and plain." F.R.C.P. Rule 8. The federal rules, for the most

part, also eliminate the need for prolix and technical pleadings. "Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required." F.R.C.P. Rule 8(e)(1).

Unlike the practice in many states, the federal rules do not draw distinctions between pleading facts, ultimate facts, or conclusions of law. Subject to a few exceptions, conclusory allegations are perfectly proper in federal actions. For example, Petitioners need not plead evidentiary facts, or set forth a complete and convincing picture of the alleged wrongdoing to survive a motion to dismiss: "A complaint is not required to allege all, or any, of the facts entailed by the claim." *Bennett v. Schmidt* (7th Cir. 1998) 153 F.3d 516, 518; *Sparrow v. United Air Lines, Inc.* (DC Cir. 2000) 216 F.3d 1111, 1115--"I was turned down for a job because of my race" was sufficient to plead a discrimination claim.

Thus, a complaint will be deemed inadequate "only if it fails to (1) provide notice of circumstances which give rise to the claim, or (2) set forth sufficient information to outline the elements of the claim or permit inferences to be drawn that these elements exist." *Beanal v. Freeport_McMoran, Inc.* (5th Cir. 1999) 197 F.3d 161, 164; *Lewis v. ACB Business Services, Inc.* (6th Cir. 1998) 135 F.3d 389, 405-406.

Federal pleading requirements are extremely liberal. The rules are designed specifically to minimize disputes over pleading technicalities. See F.R.C.P. Rules 1, and 8(f); and *Conley v. Gibson* (1957) 355 U.S. 41, 47-48. Pleadings are construed liberally in favor of the pleader; and in challenging the sufficiency of a complaint, all of its material allegations are taken as true. *Jenkins v. McKeithen* (1969) 395 U.S. 411, 421; *Gilligan v. Jamco Develop. Corp.* (9th Cir. 1997) 108 F.3d 246, 249, Rule 8 contains "a powerful presumption against rejecting pleadings for

failure to state a claim."

In this case, the Sixth Claim for Relief in the Second Amended Complaint has more than sufficiently plead a "short and plain statement," with more than the required specificity, of the Respondents' violation of the Petitioners' civil rights, due to racial and political class based animus, under 42 U.S.C. 1985(3), pursuant to F.R.C.P. Rule 8(a).

IV. CONCLUSION

The decision of the Ninth Circuit Court of Appeals conflicts with the majority of other circuit courts of appeals and district courts to have considered the question in this case. In most circuits which have considered the question, a private conspiracy remains actionable under 42 U.S.C. 1985(3), where it deprives the Petitioners of the right to vote in federal tribal elections because of a combination of "racial and otherwise class-based invidiously discriminatory animus."

Similarly here, the private conspiracy by the non-Indian Respondent gaming corporations should be held liable for depriving the Petitioners of the right to vote because the Petitioners are Indians and members of the political faction opposed to building a casino on the site of their homes.

For all of the foregoing reasons, and particularly since the Respondents appear to concede that the issue Petitioners raise is indeed "the lofty legal issue Petitioners would have this Court address," Brief in Opposition 13, the writ of certiorari to the Ninth Circuit Court of Appeals should be granted.

Respectfully submitted

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